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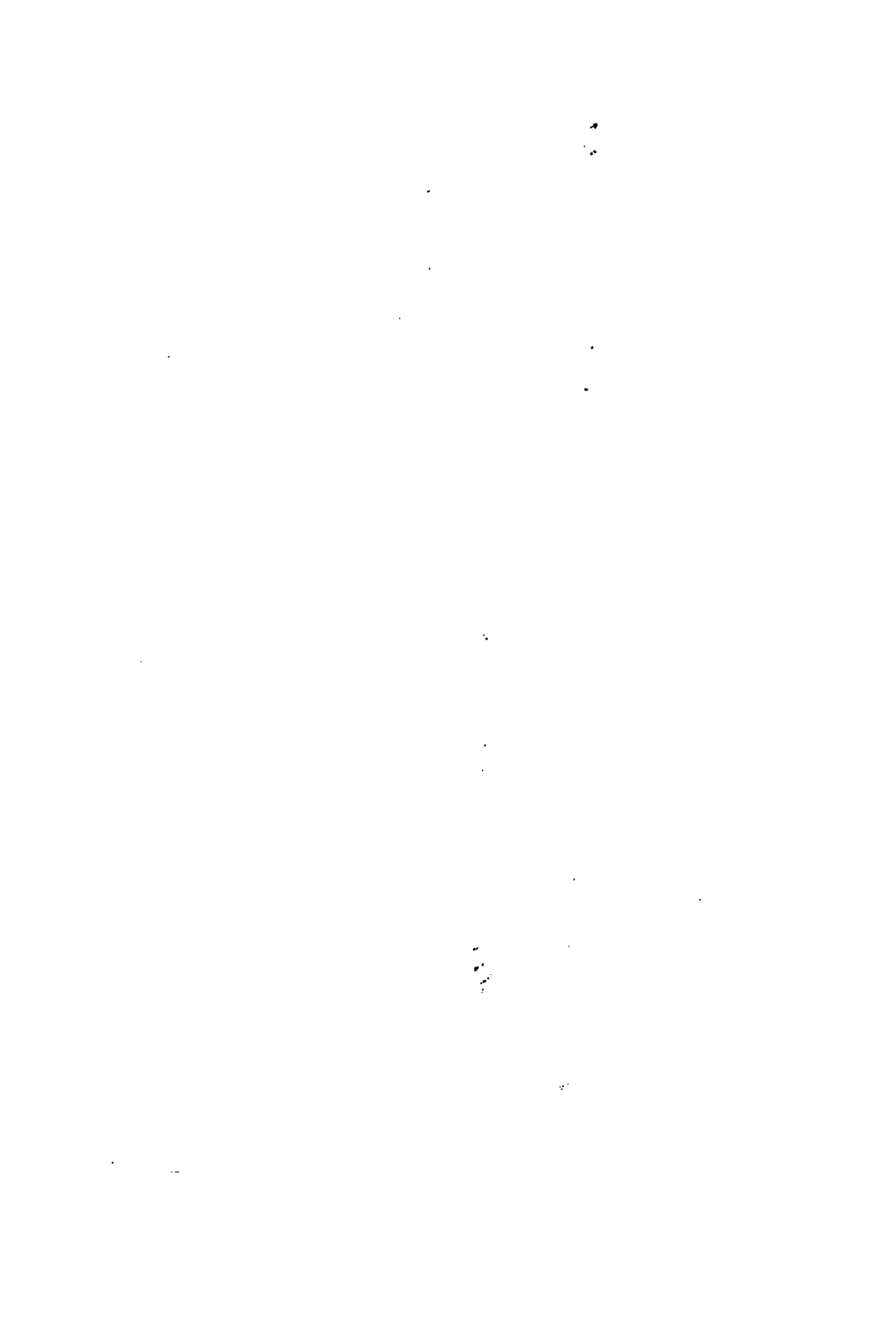
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A Summary
OF THE
PRINCIPLES OF THE LAW
OF
SIMPLE CONTRACTS.

BY
CLAUDE C. M. PLUMPTRE,
OF THE MIDDLE TEMPLE, ESQ., BARRISTER-AT-LAW.
(*Middle Temple Common Law Scholar, Hilary Term, 1877.*)



LONDON:
BUTTERWORTHS, 7, FLEET STREET,
Law Publishers to the Queen's most excellent Majesty.
DUBLIN: HODGES, FOSTER & CO.
EDINBURGH: T. & T. CLARK; BELL & BRADFUTE.
CALCUTTA: THACKER, SPINK & CO. MELBOURNE: GEO. ROBERTSON.

1879.

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LONDON :

PRINTED BY C. F. ROWORTH, BREAM'S BUILDINGS,
CHANCERY LANE, E.C.

PREFACE.

It may cause some little surprise when it is seen that, notwithstanding the many able works on the Law of Contracts that have been published, I have ventured to add yet another volume to that already formidable array of legal literature. The reason why I have done so is, because this branch of the Law, however diversely treated, still remains unreduced, whether by means of Articles and Notes, or Rules and Sub-rules, or otherwise, into the form of a Concise Summary or Digest; and in the present work I have hoped, to a certain extent, to supply the want thus existing.

This mode of writing Law Books has lately become very popular, and meets, I believe, with considerable success. To Sir Fitzjames Stephen we are already indebted for two admirable Digests on the Criminal Law and the Law of Evidence, while to Mr. Underhill we owe a Summary of the Law of Torts, and a recent very excellent little work, entitled "A Concise Manual relating to Private Trusts and

Trustees." In addition to these, I ought to mention Mr. Vaughan Hawkins' treatise on Wills, Mr. Pollock's work on Partnership, and Mr. Farwell's on Powers.

That works like these tend to lessen the difficulties experienced in mastering and comprehending the study of the Law must, I think, on all hands, be admitted; but in the case of foreigners—Students coming, as so many do now, from India, Japan, the Cape, and other distant parts, and who have to contend against the very serious obstacle of learning a science in a language foreign to their own—their use is rendered highly valuable. The Student can there read in one short Rule, clearly and concisely stated, followed by carefully chosen cases to illustrate it and to impress it on his memory, and, not unfrequently, further explained by means of a Note or Sub-rule, what in other works, differently arranged, he finds extended perhaps over some dozen pages. Having thus read and learnt the Rule, and seen its application by the cases inserted to exemplify it, he is in a position to increase that knowledge by the perusal of larger and more exhaustive treatises.

But, beyond this, they serve another object which is important, and should not be lost sight of. They accustom the Student to *method*, and teach him to

arrange his learning in his mind somewhat as he read it arranged in the page before him ; so that, instead of possessing a multitude of confused facts, which can be but of little good to him, he always has them at hand logically and well adjusted, properly connected, and ready for use when required.

The only objection of which I am aware that has been raised against thus summarizing the Law is, that it encourages what is called the system of *cramming*—a method of learning in every way dangerous, and to be deprecated. It will be found, however, on looking a little more closely at the mode of arrangement adopted, what little truth lies in the accusation, and what slight ground for fear there is on that score. Were the Rules stated simply by themselves, they might, no doubt, be put to such a purpose ; but when they are followed by cases illustrating and Notes or Sub-rules explaining them, the Student has every means at hand for procuring, not a mere superficial knowledge of his subject, but a real, comprehensive understanding, such as will serve him as a sure and trusty foundation for more advanced reading.

The present work, it will be seen, has been arranged as nearly as possible after the manner of Mr. Underhill's "Summary of the Law of Torts"—a second

edition of which has lately been published, and in which I have had the honour to assist. I have endeavoured in the space of some 200 pages, and by means of short Rules and Sub-rules, to state what I trust will be found a fairly accurate summary of the leading principles relating to the Law of Simple Contracts. These Rules are followed by cases expressly chosen for the purpose of illustrating them, and which, so long as they appeared to me likely to accomplish that end, I selected alike from the older, as well as the more recent, Reports.

How far this little Book, full of imperfections as I feel it must needs be, will prove of service to the Student, remains to be seen. That its production has been attended with considerable difficulty will be well understood by those who have experienced the arduous task of summarizing "that codeless myriad of precedent, that wilderness of single instances" of which our Law is composed; but how greatly this difficulty has been lessened by the help that has been afforded me by the labours of others, they who read these pages, and notice the references given, will perceive. More particularly do I desire to acknowledge the assistance I have derived from Mr. Chitty's "Law of Contracts," and "The Principles of Contract," by Mr. Pollock; and (in my search for cases) from such works as Mr. Roscoe's "Nisi

Prius Evidence," and the exhaustive Digest of Mr. Fisher.

I have, in conclusion, only to express my obligation to Mr. G. A. Vennell, of the Middle Temple, and to my friend and pupil Mr. Syud Abdur Rahman, of the Inner Temple, for the valuable help they have rendered me. The many useful suggestions of the former gentleman, and the care and trouble bestowed by the latter in the arrangement of the succeeding List of Cases, makes it impossible for me to speak too highly of their kindness, or to thank them too heartily.

CLAUDE C. M. PLUMPTRE.

5, HARE COURT, TEMPLE.

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INTRODUCTORY CHAPTER.

Kinds of Contracts.—Contracts are divided into three classes, that is to say:—

- (1) Contracts of Record;
- (2) Contracts under Seal;
- (3) Contracts not under Seal or Simple Contracts.

Contracts of Record and Contracts under Seal will be found fully discussed in *Mr. Chitty's Treatise on Contracts* (p. 2 *et seq.*). In the present work it is purposed considering, and that necessarily in a very elementary manner, the law of Simple Contracts.

Definition of a Simple Contract.—A Simple Contract may be defined as being a deliberate engagement between competent parties, upon a legal consideration to do, or to abstain from doing, some act. (See *Story on Contracts*, p. 1.)

This definition, it will be seen, admits of being divided in the following manner:—

- (1) The Parties to the Contract.

- (2) The Constituent Elements of the Contract, that is to say:—
- (a) The Consent of the Parties;
 - (b) The Consideration;
 - (c) The Promise.
- (3) The Mode and Manner in which the Contract is to be Expressed.

Executed and Executory Contracts.—An **Executed** Contract is one which is wholly performed by both parties (*Broom, Com.* 253; *Story on Con.* 14; 2 *Steph. Com.* 57).

An **Executory** Contract is one in which neither the promise nor the consideration is performed.

A contract may be also **Partly Executed** and **Partly Executory**, as where the consideration is performed, but the promise is not.

“If A. and B. agree to exchange horses, and they do it immediately, here the possession and the right are transferred together,” and the contract is executed; but “if they agree to exchange next week, here the right only vests, and their reciprocal property in each other’s horse is not in possession, but in action,” and the contract is executory (*Moz. Law Dic.* p. 147; 2 *Bl.* 443; 2 *Steph. Com.* 58). While, if A. has already delivered his horse to B., and, in consideration of his having done so, B. promises to

send him his, then the contract is partly executed and partly executory.

Express and Implied Contracts.—Where the agreement is formal and stated, either verbally or in writing, it is usually called an **Express Contract**; where the agreement is matter of inference or deduction, it is called an **Implied Contract**. (See *Story*, p. 4.)

PART I.

THE PARTIES TO A CONTRACT.



CHAPTER I.—INFANTS.

II.—MARRIED WOMEN.

III.—PERSONS NON COMPOS MENTIS —
DRUNKARDS—CONVICTS AND OUT-
LAWS—AND BANKRUPTS.

IV.—CORPORATIONS—AGENTS.

V.—PARTNERS.



PART I.

PARTIES TO A CONTRACT.

RULE I.—All persons are in law presumed to have capacity to contract; and it is for the person claiming exemption from performing his contract on the ground of incapacity, to prove the existence thereof (see *Chitty on Con. p. 132*).

Exceptions.—The following persons form the most important exceptions to this rule, and labour under certain disabilities in contracting:—

1. Infants.
2. Married women.
3. Persons *non compos mentis*.
4. Drunkards.
5. Convicts and Outlaws.
6. Bankrupts.

NOTE.—Aliens. By the Naturalization Act, 1870 (33 Vict. c. 14), the disabilities to which aliens formerly were subject have, it would seem, been practically removed. (See sect. 2, and the remarks made thereon in *Chitty on Cont. p. 179*.)

CHAPTER I.

ON CONTRACTS BY INFANTS.

RULE 2.—No contract, other than a contract for necessities, is binding upon an infant (*Co. Litt.* 172*a*; 37 & 38 *Vict. c.* 62, s. 1).

Thus an infant cannot trade so as to render himself liable thereby (*Dilk v. Keighly*, 2 *Esp.* 480); nor can he bind himself by accepting, drawing, or indorsing a bill (*Williams v. Harrison*, *Carth.* 160); nor by giving a warranty of goods sold by him (*Howlett v. Haswell*, 4 *Camp.* 118); nor by borrowing money (*Darby v. Bouchier*, 1 *Salk.* 279; 37 & 38 *Vict. c.* 62, s. 1, see *p.* 10).

What are Necessaries? *The expression "necessaries" is not limited in law to those articles actually essential to the maintenance of life and health; but will include those which, taking into consideration "the degree, state, and station in life" of the infant, can reasonably be supposed necessary to enable him to support the position he holds in society, provided he is not already amply supplied therewith.*

In *Peters v. Fleming* (6 *M. & W.* 42), Parke, B. thus enunciates the law on this subject:—"It is perfectly clear that, from the earliest times down to the

present, the word 'necessaries' was not confined to such articles as were necessary to the support of life, but extended to articles fit to maintain the particular person in the state, station, and degree of life in which he is: and, therefore, we must not take the word 'necessaries' in its unqualified sense, but with the qualification above pointed out. . . . The true rule I take to be this, that all such articles as are purely ornamental are not 'necessaries,' and are to be rejected because they cannot be requisite for any one: and for such matters, therefore, an infant cannot be held responsible. But, if they are not strictly of this description, then the question arises, whether they were bought for the necessary use of the party, in order to support himself properly in the degree, state, and station of life in which he moved. If they were for such articles, the infant may be made responsible."

The following examples will suffice to illustrate the above definition :—

(1) A captain in the army, who was under age, was held liable for a livery supplied to his servant at his request; but not for cockades for the soldiers of his company (*Hands v. Slaney*, 8 T. R. 578).

(2) An apprentice to a chemist, who was entitled to property when of age, and who had nearly attained his majority, bought a horse. The jury found, on it appearing that the infant had been ordered horse exercise, that the horse was a necessary, and the court refused to set aside the verdict (*Hart v. Prater*, 1 *Jurist*, 623).

(3) Dinners, confectionery, or fruit supplied to an

infant, an undergraduate in the university, having lodgings in the town, are not, *prima facie*, necessities; and in an action brought against him for such articles, no special circumstances being shown, the court will direct a non-suit to be entered (*Brooker v. Scott*, 11 *M. & W.* 67).

(4) In *Harrison v. Fane* (1 *M. & Gr.* 550), the defendant, who was an infant, and younger son of a gentleman possessed of a considerable amount of property, but who had a large family, was sued for the hire of certain horses and gigs. It appeared that the defendant kept a horse, and sometimes hunted with his father. Held, that there was nothing in the case to render the hire of the horses or gigs a necessary.

(5) A promise by a child, who was only fourteen years old, to pay a reasonable sum for his schooling, has been held binding upon him (*Pickering v. Gunnings*, *Sir W. Jones*, 182).

(6) A silver goblet for presentation to a friend, at whose house an infant was staying, is not a necessary (*Ryder v. Wombwell*, *L. R.*, 4 *Ex.* 32).

(7) A minor who had been supplied by one tradesman with ten coats, and immediately afterwards with another by the plaintiff, was held not to be bound to pay for such coat, as it was unnecessary.

In such a case the infant may call evidence to show that he had all the clothes which were suitable to his degree and estate from other tailors (*Burghart v. Angerstein*, 6 *C. & P.* 690).

Until the recent case of *Ryder v. Wombwell* (*L. R.*, 3 *Ex.* 90), it seems to have been fully settled that, where the infant was already sufficiently supplied

with the articles sold him, such articles could not be considered necessities, although the tradesman was not aware of his being so supplied (*Bainbridge v. Pickering*, 2 *W. Bl.* 1325; *Bragshaw v. Eaton*, 7 *Scott*, 183; *Dalton v. Gib*, 7 *Scott*, 117; *Ford v. Fothergill*, *Peake*, 229; *Foster v. Redgrave*, *L. R.*, 4 *Ex.* 35). In the above case, however, it was decided by the Court of Exchequer that, unless the plaintiff could be shown to have been aware of the fact, evidence was inadmissible to prove that the defendant was at the time provided with the articles supplied him. The judgment in this case was reversed in the Exchequer Chamber, but on another point; the judges, in respect to the present, contenting themselves by saying: "There is much to be urged in support of the view taken by the majority of the court below, and we desire not to be understood as either overruling it, or affirming that decision. If ever the point again arises, the court before which it comes must determine it on the balance of authority and principle, without being fettered by a decision of this court." In the absence of any further authority to the contrary, I have thought myself justified in stating the law as above. In this conclusion I am supported by Mr. Simpson in his valuable work, *The Law of Infants*, p. 89.

Necessaries supplied to the Wife or Children of an Infant. Sub-rule 1.—*An infant is liable for necessities supplied to his wife, or to his lawful children, on his express or implied authority.*

(1) "If," it has been said, "a man under the age

of twenty-one contract for the nursing of his lawful child, this contract is good, and shall not be avoided by infancy, no more than if he had contracted for his own aliments or erudition." (*Bac. Max. reg.* 18.)

(2) So, an infant husband may bind himself by a contract for the burial of his wife, or the infant wife for the burial of her husband (*Chapple v. Cooper*, 13 *M. & W.* 252).

Where, however, a parent, whether an infant or otherwise, has not expressly or impliedly authorized his child to pledge his credit, he will not be liable even for necessities supplied to such child (*Mortimore v. Wright*, 6 *M. & W.* 482; *Shelton v. Springett*, 11 *C. B.* 452).

Slight circumstances will raise a *prima facie* presumption of authority to purchase necessities; as, that the goods were delivered at the father's house; but the presumption is rebutted by showing that the father allowed his son sufficient money wherewith to procure such articles, or that he had ordered them elsewhere (see *Chitty*, 147).

Money lent to an Infant for the purpose of Paying for Necessaries. Sub-rule 2.—*At common law money lent to an infant, even for the express purpose of paying for necessities, could not be recovered (Darby v. Boucher, 1 Salk. 279). In equity, however, when there was a loan to an infant, and the money was actually spent in paying creditors for necessities that had been supplied him, the lender might come into the court, and stand in the place of those*

creditors whose debts had been so paid (Marlow v. Pitfield, 1 P. Wms. 558; In re National Permanent Benefit Building Society, 5 Ch. App. 313).

Query, how this would be since the Infants' Relief Act.

Functions of Judge and Jury. Sub-rule 3.

—The question of necessities, or not necessities, is one of fact, and, therefore, for the jury. But like all other questions of fact should not be left to the jury, unless there is evidence on which they can reasonably find in the affirmative.

“We quite agree,” remarks Willes, J., “that the judges are not to determine facts, and, therefore, where evidence is given as to any fact, the jury must determine whether they believe it or not. But the judges do know, as much as juries, what is the moral and normal state of things. If a state of facts exist (as it well may) so new and so exceptional that the judges do not know of it, that may be proved as a fact: and then it will be for a jury, under a proper direction, to decide the case. But it seems to us, that, if we were to say, that in every case the jury are to be at liberty to find anything to be necessary, on the ground that there may be some usage of society, not proved in evidence, and not known to the court, but which is suggested that the jury may know, we should, in effect, say that the question for the jury was whether it was shabby in the defendant to plead infancy. We think the judges must determine whether the case is such as to cast on the plaintiff the onus of proving that the articles are within

the exception, and then whether there is any sufficient evidence to satisfy that onus" (*Ryder v. Wombwell*, L. R., 4 Ex. 40).

Voidable Contracts. RULE 3.—Contracts which were beneficial to an infant (and, perhaps, those that were not, see *Pollock on Con.* p. 35) were formerly only voidable and not void. But by the Infants' Relief Act (37 & 38 Vict. c. 62, s. 1), it is, in effect, enacted, that all contracts, whether by specialty or by simple contract, entered into by infants for the repayment of money lent, or to be lent, or for goods supplied, or to be supplied (other than necessities), and all accounts stated with infants, shall be absolutely void: provided always, that that enactment shall not invalidate any contract which an infant may by any present (see, for example, 18 & 19 Vict. c. 43) or future statute, or by common law or equity, enter into, except such as are now by law voidable.

Ratification.—The effect of a contract being voidable and not void was that the infant could, on attaining his majority, ratify it, and so render himself liable thereon. This ratification might at common law be inferred from any act done, or declaration made, by the *quondam* infant, provided such act or declaration amounted to a recognition of his liability

(*Harris v. Wall*, 1 *Ex.* 122) ; and in the case of continuing contracts, such as partnership, it was held, that, unless within a reasonable time after attaining his majority, he did something clearly showing his intention to disaffirm such contract, he must be taken as having ratified it (*Goode v. Harrison*, 5 *B. & Ald.* 147). By Lord Tenterden's Act (9 *Geo.* 4, c. 14) it was provided that no action should be maintained whereby to charge any person, upon any promise made after full age to pay any debt contracted during infancy, or upon any ratification of any simple contract made during that period, unless such promise or ratification was made in writing and signed by the party to be charged therewith ; and now by sect. 2 of the Infants' Relief Act it is enacted that—

Sub-rule.—*No action shall be brought whereby to charge any person upon any promise made after full age to pay any debt contracted during infancy, or upon any ratification made after full age of any promise or contract made during infancy, whether there shall, or shall not, be any new consideration for such promise or ratification after full age.*

Effect of Infants' Relief Act.—The effect of sect. 2 of this act is to supersede the 5th section in Lord Tenterden's Act, and (instead of requiring a ratification in writing signed by the party to be charged therewith) to render void such ratification, however it may be made. But as Lord Tenterden's Act did not extend to continuing contracts, so the better opinion

would seem to be that the Infants' Relief Act would not; and that on such a contract a person may still render himself liable by not disaffirming for any breach thereof committed by him *after* attaining his majority (see remarks in *Simpson on Infants*, p. 18; and *Chitty on Contracts*, p. 151). The following cases will suffice to illustrate this:—

(1) A., an infant, employs B. as his servant. A.'s position is such that a servant cannot be considered a "necessary" for him. The servant continues in his employment without any fresh contract being made after A.'s infancy is terminated. Held, under Lord Tenterden's Act, and, it is submitted, would be so held under the one in discussion, that A. was liable for wages due to B. for services performed by him *after* A.'s majority, but not for those due in respect of services performed *prior* to that event (see *Waldo v. Waldo*, 1 F. & F. 173).

(2) For the same reason, it is presumed, that an infant partner, who neither affirms nor disaffirms the partnership, but who continues a partner therein, will be liable for debts incurred by his co-partner subsequent to his majority (*Goode v. Harrison, sup.*)

Under this statute it has been decided—

(1) That it is immaterial whether the contract was made before or after the passing of the act, so long as the ratification of such contract has taken place since the date of its operation (*Ex parte Kibble, L. R.*, 10 Ch. App. 373).

(2) That sect. 2 applies to promises of marriage (*Coxhead v. Mullis, L. R.*, 3 C. P. D. 439). In that

case, decided as recently as December of last year, the facts were as follows: the defendant, during his infancy, promised to marry the plaintiff, and, after coming of age, *recognized* without *expressly repeating* the promise, and eventually broke it. The plaintiff sued for the breach and was nonsuited. Held, that the nonsuit was right, for, assuming that there was a ratification of the promise subsequent to his majority, the right of action upon such ratification was taken away by the above section, and that there was no evidence of any fresh promise made after the defendant came of age.

“Before saying a word upon the question whether the act applies,” observed Coleridge, C.J., “I may observe that I am of opinion that, where there is a clear promise, such as was proved in this case, a promise to marry being in this respect like any other contract, ratification, if it exists, must have reference to the contract proved, and you cannot say, because there is a ratification from day to day, that there is a fresh promise from day to day. Evidence of ratification is one thing, evidence of a fresh promise is another.”

RULE 4.—A person of full age contracting with an infant is bound thereby, though the latter be not.

“Infancy,” it has been said by an old writer, “is a personal privilege of which no one can take advantage but the infant himself; and, therefore, though the contract of the infant be voidable, yet it shall bind the person of full age: for being an indul-

gence which the law allows infants to secure them from the fraud and imposition of others, it can only be intended for their benefit, and is not to be extended to persons of the years of discretion, who are presumed to act with sufficient caution and security; and, were it otherwise, this privilege, instead of being an advantage to the infant, would in many cases turn greatly to his detriment."

Thus, A., a person of full age, agrees to marry B., an infant; on his failing to do so, B. has a right of action for breach of contract against A. (*Holt v. Ward*, 2 Str. 937).

RULE 5.—It has been held to be no answer to a plea of infancy to state that the defendant fraudulently misrepresented his age at the time of entering into the contract, and that owing thereto the plaintiff contracted with him (see *Chitty*, 138; *Johnson v. Pye*, 1 Sid. 258; *Bartlett v. Wells*, 1 B. & S. 836).

But in equity infants are no more entitled than adults are to gain benefits to themselves by fraud (*per Turner*, L. J., *Nelson v. Stocker*, 28 L. J., Ch. 760); and on the ground of fraudulent misrepresentation relief would probably be granted against them (*Ex parte Union Joint Stock Mutual Banking Co.*, 27 L. J., B. Ca. 33; *Story on Eq.* 246. As to the nature and extent of this relief see *Pollock on Contracts*, p. 56).

How an Infant may Sue. **RULE 6.**—Infants may sue as plaintiffs by their next

friend, in the manner practised in the Court of Chancery, before the passing of the Judicature Act, and may, in like manner, defend any action by their guardian appointed for that purpose (38 & 39 Vict. c. 77, First Sched. Order XVI. s. 8).

CHAPTER II.

ON THE CONTRACTS OF MARRIED WOMEN.

SECTION I.

Contracts of Wife before Marriage.

Husband's Benefit to. RULE 7.—The benefit of the wife's contracts, entered into by her before marriage, vests in her husband, provided he reduces the same into possession during her lifetime (*Purdew v. Jackson*, 1 Russ. 1).

What is a Reduction into Possession.—Sub-rule 1.—*There must be some precise and specific act done "from which the court may reasonably infer the disagreement of the husband to the interest of the wife, and an extinguishment of her rights"* (*Scarpellini v. Atcheson*, 7 Q. B. 864, 867).

(1) Where the husband brings an action on the contract in the joint names of his wife, and himself, and recovers judgment thereon, such a proceeding would constitute a reduction into possession; as would his (*Scarpellini v. Atcheson*, *sup.*), or some third party at his request, actually receiving the money due thereon (see *Chitty*, 153).

(2) In an action by a payee against the maker of a note, the defendant pleaded that, when the note was made, the plaintiff was the wife of B., and that he elected to take the note in his marital right, and she, by his authority, indorsed the note, and B. delivered it and indorsed it to F., and after the note became due, and before action, B. died, and the note came to the plaintiff's possession by delivery from F. Held, that the plea was bad, because it did not clearly show such a reduction of the note into possession of the husband, as disentitled the wife to sue thereon after his death (*Scarpellini v. Atcheson, sup.*)

(3) In *Hart v. Stephens* (6 Q. B. 937), the court held that the mere fact of the husband receiving interest on a note given to his wife, when she was a *feme sole*, did not amount to a reduction into possession. See also on this subject, *Atcheson v. Dixon* (L. R., 10 Eq. 589), *Fleet v. Perrins* (L. R., 4 Q. B. 500).

RULE 8.—Should the husband die before the wife, without having reduced her choses in action into possession, they will survive to her, subject to debts contracted by her *dum sola* (*Richards v. Richards*, 2 B. & A. 447; *Rumsey v. George*, 1 M. & S. 180); and, where the husband, under similar circumstances, survives the wife, he will be entitled thereto as her administrator, and consequently only after payment of her lawful debts (*Betts v. Kimpton*, 2 B. & Ad. 273).

If, after the death of the wife, the husband fails to take out letters of administration to her estate, but some other person does, such person, after payment of the wife's debts, must hand over the surplus to the husband (*Dreiv v. Long*, 22 *L. J. (N. S.) Ch.* 717).

Husband's Liability on. RULE 9.—A husband, except in the cases hereinafter mentioned, is liable upon all his wife's contracts, made while a *feme sole* (*Beynon v. Jones*, 15 *M. & W.* 566); but should he survive her, that liability ceases, except as administrator to her choses in action still unreduced into possession (*Heard v. Stamford*, 3 *P. Wms.* 409).

Exceptions.—(1) In respect to husbands married after the passing of the Married Women's Property Act* (~~37 & 38 Vict. c. 56~~)—which came into operation on August 9th, 1870—and before the Married Women's Property Amendment Act, 1874, it is enacted by sect. 12 of the former statute, that—

A husband shall not, by reason of any marriage which shall take place after this Act has come into operation, be liable for the debts of his wife contracted before marriage; but the wife shall be liable to be sued for, and any property belonging to her separate use shall be liable to satisfy such debts, as if she had continued unmarried.

(2) This section was repealed by 37 & 38 Vict.

* 33 & 34 Vict. c. 93.

c. 50, ss. 1, 2; and in respect to marriages taking place after the 30th of July, 1874, the law on this point stands thus:—

The husband and the wife may be sued jointly for any of the wife's debts contracted before marriage, or for damages sustained by reason of any tort committed by the wife before marriage, or by reason of the breach of any contract made by the wife before marriage, and the husband shall in such action be liable for the debt or damages respectively, to the extent only of the assets therein specified; and by-sect. 4, it is further provided that when the husband and wife are sued jointly, if it appears that the husband is liable for the debt recovered, or any part thereof, the judgment, to the extent of the amount for which the husband is liable, shall be a joint judgment against the husband and wife, and as to the residue, if any, of such debt, the judgment shall be a separate judgment against the wife.

SECTION II.

Contracts of Wife during Marriage.

When a Married Woman can sue or be sued. RULE 10.—A married woman, whether living with her husband, or apart, whether with or without his consent, is unable to contract so as to sue, or be sued thereon (*Marshall v. Rutton*, 8 T. R. 545; see also remarks in *Atwood v. Chichester*, L. R., 3 Q. B. D. 722), except in the following cases:—

Exceptions.—(1) Where her husband is civilly

dead, as where he is undergoing penal servitude (*Carrol v. Blencow*, 4 Rep. 27).

(2) A married woman is by the custom of London entitled to sue, and be sued, in the city courts, in respect to contracts made by her, when she is carrying on a trade in the city apart from her husband. It would appear, however, that even in this case the husband must be joined for the sake of conformity (*Caudell v. Shaw*, 4 T. R. 361).

(3) In equity, a *feme covert* may be treated as a *feme sole* in respect to property settled upon her for her separate use (*Peacock v. Monk*, 1 Ves. 128); and, consequently, may render such estate liable by her contracts, provided "she purports to contract not for her husband, but for herself, and on the credit of her separate estate, and it was so intended by her, and so understood by the person with whom she is contracting" (*Matthewson's case*, L. R., 3 Eq. 781, 787; *Johnson v. Gallagher*, 30 L. J., Ch. 298; *The London Chartered Bank of Australia v. Lemprière*, L. R., 4 P. C. 572). It is necessary that the husband be made a party to the suit.

(4) By 20 & 21 Vict. c. 85, s. 26, a wife judicially separated shall be considered as a *feme sole* for the purpose of contract, and wrongs, and injuries, and suing, and being sued in any civil proceeding; and her husband shall not be liable upon any of her engagements then made. Moreover, by 21 & 22 Vict. c. 108, s. 8., it is further enacted, that no discharge, variation, or reversal of any decree for a judicial separation shall prejudice or affect any rights or remedies which any person would have had in case the same had not been reversed, varied, or dis-

charged, in respect of any debts, contracts, or acts of the wife incurred, entered into, or done, between the time of the making of such decree and the discharge, variation, or reversal thereof.

(5) The 21st sect. of above-stated Act (20 & 21 Vict. c. 85) enables a wife to apply to a magistrate for a protection order when she has been deserted by her husband: and the wife shall during the continuance thereof be, and be deemed to have been during such desertion, in the like position in all respects with regard to property and contracts, and suing and being sued, as she would be if she had obtained a judicial separation.

(6) Next we have to consider the alteration in the law effected by the Married Women's Property Act, 1870. Section 1 enacts as follows:—The wages and earnings of any married woman acquired or gained by her after the passing of this Act, in any employment, occupation, or trade in which she is engaged, or which she carries on separately from her husband, and also any money or property so acquired by her through the exercise of any literary, artistic, or scientific skill, and all investments of such wages, earnings, money, or property shall be deemed and taken to be property held and settled to her separate use, independent of any husband to whom she may be married, and her receipts alone shall be a good discharge for such wages, earnings, money, and property; and by section 11 it is further provided—A married woman may maintain an action in her own name for the recovery of any wages, earnings, money, and property by this Act declared to be her separate

property, or of any property belonging to her before marriage, and which her husband shall, by writing under his hand, have agreed with her shall belong to her after marriage as her separate property, and she shall have in her own name the same remedies, both civil and criminal, against all persons whomsoever for the protection and security of such wages, earnings, money, and property, and of any chattels and property belonging to her as an unmarried woman (see *Sumners v. City Bank*, *L. R.*, 9 *C. P.* 580; also *R. v. Carnatic R. Co.*, *L. R.*, 8 *Q. B.* 299; *Lovell v. Newton*, *L. R.*, 4 *C. P. D.* 7). It will be seen that this latter section, though it gives a married woman the right of suing in her own name, does not confer upon others the right to so sue her. The Act makes property acquired as above stated "separate property," and consequently the creditor who seeks to procure payment thereout is bound by the general rule in equity that no suit can be instituted against a married woman without the husband being a party. This point was discussed in the recent case of *Hancocks v. Lablache* (*L. R.*, 3 *C. P. D.* 197); and Mr. Justice Lindley there observes, "Now, the first question here is whether, on the true construction of the Married Women's Property Act, 1870, such property as is therein declared to belong to her for her separate use is property in respect of which she can sue, and be sued, as if unmarried? That it is such as she can sue for is undoubtedly declared in sect. 2; but, save in certain excepted cases, the Act does not expressly render her liable to be sued, and ss. 1 and 2 cannot be construed to mean that the property in s. 1

declared to belong to her apart from her husband, will by virtue of s. 2 belong to her in all respects as if she were an unmarried woman. I do not think it mere accident that a different set of phrases was used in s. 1. and s. 2. It may have been thought expedient to give the wife power to sue in actions without joining her husband, and yet not to give power to others to sue her without joining him, and I cannot hold that the words in s. 1 are equivalent to a provision that the property therein mentioned shall be deemed to belong to the wife as if she were unmarried. Starting from that point, I come to the conclusion that the property specified in s. 1. must be treated as belonging to the wife in the manner and to the extent there mentioned, viz. as if settled to her separate use. . . . So I find that the Act has not altered the law as to the proper mode of suing a married woman in respect of that property which by this Act is made her separate estate. . . . The question is one of much more than mere form, because if the action could be maintained without joining the husband, judgment binding the wife's estate might be obtained against it in his absence, whereas he might have been able successfully to resist it, and so protect his own interest."

(7) Where a promise is made to the wife, in consideration of her exercising some personal skill or labour, or in any case, where she herself can be considered "the meritorious cause of the action," she may be joined as plaintiff with her husband, and, in such a case, should the husband die before execution, the benefit of the judgment will survive to her (see

Chitty, 177; *Nurse v. Wills*, 4 B. & Ad. 739; see *Sherrington v. Yates*, 12 M. & W. 855).

Thus, when a married woman has undertaken for a certain sum to cure a wound, she may be joined with her husband in suing for such sum (*Brashford v. Buckingham*, Cro. Jac. 77).

Similarly she may be joined in suing on a note made payable to her (*Phillishick v. Pluckwell*, 2 M. & S. 393). "Is not the wife," it was then remarked, "the meritorious cause of the action; she is the donee of the note, and it is acquired through her, and the note is a thing which of itself imports a consideration."

(8) A married woman may, under the Judicature Acts, 1873, 1875 (*First Sched. Ord.* 16, s. 8), by leave of the court or a judge, sue or defend without her husband, and without a next friend, on giving such security (if any) for costs as the court or judge may require.

(9) Where the husband has not been heard of for seven years, the presumption is that he is dead, and after that period the wife will be *prima facie* answerable on the contracts entered into by her.

Husband's Liability on Wife's Contracts.

RULE 11.—A husband is not liable in respect of the contracts entered into by his wife during marriage, unless in so contracting she has acted with his express or implied authority (*Manby v. Scott*, 1 Sid. 109).

The husband is not liable in respect of a contract

made by his wife without his assent to it, and a party seeking to charge him in respect of such a contract is bound either to prove an express assent on his part, or circumstances from which such assent is to be implied (*per* Littledale, J., in *Montague v. Benedict*, 2 Sm. L. C. 473).

Where the Wife is impliedly her Husband's Agent. (Sub-rule).—*Where a wife is living with her husband, the presumption is that she has his authority to pledge his credit for all articles that are suitable to that station which he permits her to assume* (*Jolly v. Rees*, 15 C. B., N. S. 628; *Phillipson v. Hayter*, L. R., 6 C. P. 38; *Manby v. Scott*, *sup.*).

(1) A wife has *prima facie* authority to act as her husband's agent, and to bind him by orders given in those departments of her husband's household which she has under her control; or for clothes suitable to her position (*Freestone v. Butcher*, 9 C. & P. 643).

(2) But when it appeared that the plaintiff, a jeweller, in the course of two months, had supplied the defendant's wife with jewelry amounting in value to 83*l.*, and that the defendant was a special pleader, living in a furnished house at 200*l.*, that the wife's fortune upon her marriage was under 4,000*l.*, and that she was well provided with jewelry, and had never worn the articles supplied by the plaintiff in the defendant's presence, nor had the plaintiff, when he called, ever demanded to see the defendant, it was held that the goods so furnished were not necessities, and that, as there was no evidence to go to the jury to show any assent of the husband, the action could not be maintained (*Montague v. Benedict*, *sup.*).

Presumption Rebuttable. (Sub-rule 1).—*The presumption in the above rule may be rebutted (Manby v. Scott, sup.); as by showing that the husband had expressly warned the plaintiff or his servant not to trust her any more (Etherington v. Parrott, 1 Salk. 118); or that the wife received a sufficient allowance for dress, etc. (Renause v. Teakle, 8 Ex. 680).*

It was formerly considered that a private agreement between man and wife could not affect the tradesman. "It matters not what private agreement they may make," it was said, "the wife has all the usual authorities of a wife." In the case of *Jolly v. Rees* (15 C. B., N. S. 628), however, a different rule is laid down, and there it was held a husband's liability for necessaries supplied to his wife may be rebutted when it can be shown that he had expressly ordered his wife not to pledge his credit, even though the tradesman knew nothing of such order.

Ratification by Husband. RULE 12.—A husband is liable, whatever be the nature of the goods supplied to his wife, if he knowingly permits her to receive the same, or by his subsequent conduct ratifies her contract (*Waithman v. Wakefield, 1 Camp. 120*).

Cohabitation. RULE 13.—Where a man lives with a woman, who passes for his wife, he will be *primâ facie* liable for necessaries supplied her, notwithstanding the fact that the true relationship of the parties was

known to the plaintiff (*Watson v. Threlkeld*, 2 *Esp.* 637); and unless the tradesman has had knowledge of the termination of the cohabitation he can recover for necessities supplied, even after it has ceased (*Ryan v. Sams*, 12 *Q. B.* 460).

Separation by Mutual Consent. RULE 14.—“Where the husband and wife are living apart by mutual consent, the husband will, under ordinary circumstances, and in the absence of any express revocation of her agency, be liable for necessities supplied her, unless he allow and actually pay her a sufficient sum for her proper maintenance” (*Sm. L. C.*, Vol. 2, p. 490; *Hodgkinson v. Fletcher*, 4 *Camp.* 70; *Johnston v. Sumner*, 3 *H. & N.* 261; see also *Eastland v. Burchell*, *L. R.*, 3 *C. P. D.* 432).

Wife having Income of her own. (Sub-rule 1.)—*But where the wife possesses a private income of her own sufficient to maintain her, and, perhaps, where she is able to earn one* (*Johnston v. Sumner*, 3 *H. & N.* 261), *the husband will not be liable for necessities, even though he fails to make her an allowance* (*Clifford v. Laton*, *M. & M.* 102).

It has been held that a pension given by the crown, and capable of being revoked at will, is not such a source of income as will meet the above sub-rule (*Thompson v. Harvey*, 4 *Burr.* 2177).

Plaintiff's knowledge of Wife's Allowance. (Sub-rule 2.)—*The fact that the tradesman who supplied the goods knew, or did not know, that the wife was receiving an allowance from her husband is immaterial (Mizen v. Pick, 3 M. & W. 481).*

Separation by Husband's Misconduct.
RULE 15.—Where the separation is caused by the misconduct of the husband, and he does not make his wife a proper allowance (*Hodgkinson v. Fletcher, 4 Camp. 70*), he will be liable for necessities supplied her (*Rawlyns v. Vandyke, 3 Esp. 251*).

“If a man will not receive his wife into his house, or turns her out of doors, he sends her with credit for her reasonable expenses.” (*Per Lord Eldon, in Rawlyns v. Vandyke, sup.*).

It would seem that the presumption that the law thus raises that the man who turns his wife adrift upon the world unprovided for, has constituted her his agent for the purpose of procuring for herself necessities, cannot be rebutted (*Sm. L. C., Vol. 2, p. 492*), or, at least, is in no way affected by any notice, particular or otherwise, he may give to the tradesman, not to trust her (*Boulton v. Prentice, Str. 1214; Langworthy v. Rockmore, 1 Lord Raymond, 444*). See, however, *Johnston v. Sumner, sup.*, as to whether, supposing the wife was already provided for from other sources, the husband would then be liable. It is not necessary that the wife should be actually turned out of her house; it is enough that

her husband's conduct has been such as to make her in bodily fear of living with him (*Baker v. Sampson*, 14 C. B., N. S. 383); or of such an immoral character that she cannot be expected to remain in the house; as, when he brings another woman under his roof to live with him as his mistress (see *Aldis v. Chapman*, 1 Sel. N. P., 9 Ed. 276; *Houliston v. Smyth*, 3 Bing. 127).

Separation by Wife's Misconduct. RULE 16.—Where the wife is turned away from her husband's house by reason of her having committed adultery, or where she improperly leaves her husband without his consent, and remains absent from him, even though there has been no adultery, she cannot bind him for necessities (*Cooper v. Lloyd*, 6 C. B., N. S. 519; *Johnston v. Sumner*, *sup.*; *Hindley v. Marquis of Westmeath*, 6 B. & C. 200).

The same rule applies where the husband has himself been guilty of adultery (*Govier v. Hancock*, 6 T. R. 603).

Presumption as to Cause of Separation.
Sub-rule.—Where a married woman is living apart from her husband, the presumption is that the separation is owing to her own misconduct, and, consequently, the plaintiff who seeks to recover from the husband must show it to have been caused in some other way (*Reed v. Moore*, 5 C. & P. 200).

Lunacy. RULE 17.—The authority of a wife to pledge her husband's credit is no greater in the case of a lunatic than in the ordinary case of husband and wife (*Richardson v. Dubois*, *L. R.*, 5 *Q. B.* 51).

Fraudulent Misrepresentation. Rule 18.—A husband is not liable for a false representation by his wife that she was a *feme sole*; though in consequence thereof the plaintiff may be induced to contract with her (*The Liverpool Adelphi Loan Ass. v. Fairhurst*, 9 *Ex.* 422; see also *Wright v. Leonard*, 11 *C. B.*, *N. S.* 258).

CHAPTER III.

CONTRACTS BY PERSONS NON COMPOS MENTIS—CONTRACTS BY DRUNKARDS—CONTRACTS BY PERSONS UNDER DURESS—CONTRACTS BY CONVICTS AND OUTLAWS—AND CONTRACTS BY BANKRUPTS.



SECTION 1.

Contracts by Persons non compos mentis.

Contracts for Necessaries. Rule 19.—Persons *non compos mentis* are liable for necessaries supplied to them, provided no advantage has been taken of their state of mind by the other contracting party. Money *bonâ fide* expended in procuring them necessaries can also be recovered (*Nelson v. Duncombe*, 9 *Beav.* 211; *Wentworth v. Tubb*, 1 *Y. & C. C. C.* 171).

In this latter case Shadwell, V.-C., observes, “The inconvenience which would ensue if necessaries could not be supplied to a person in this situation, except gratuitously, so far as he and his estate are concerned, would be great. The consequence might be that, notwithstanding the possession of large estates, such a

person might be left to casual charity, thrown upon the parish, or exposed to starvation. I am not prepared to say that such is the state of the law, and, as at present advised, I think that it is not so" (p. 174).

In the leading case of *Baxter v. Earl of Portsmouth* (5 B. & C. 170) it was held that the defendant, the Earl of Portsmouth, was liable for the hire of certain carriages, notwithstanding the fact that he was insane, on it appearing that such carriages were suitable to his degree and fortune, that the price charged for the hire thereof was reasonable, that the plaintiff was not aware of his insanity, and that, consequently, no imposition was practised upon him. Abbott, C.J., thus stated the law: "I was of opinion at the trial that the evidence produced in this case was not such as ought to defeat the plaintiff's right of recovering in the present action, considering that it was brought for the hire and use of carriages, suited to the state and degree of the defendant, and by him actually ordered and enjoyed. That was the ground on which I expressed my opinion. I, however, took care to distinguish this from the case of an unexecuted contract, and from the case of an agreement entered into under such circumstances as might lead any reasonable person to conclude that at the time it was made the party was of unsound mind. A case of the latter description would come under that class where imposition is practised upon, or advantage taken of, the mental infirmity of the contracting party. In such cases I by no means wish to extend the opinion which I have formed in the present instance. My

judgment is governed by a reference to the particular circumstances of this case, and it is not to be understood as embracing cases of the description to which I have alluded. Imbecility of mind may, or may not, be a defence in the case of an unexecuted contract. I am not saying that it would, nor does my present opinion decide that it would not."

Although in this case the decision might have been different had the plaintiff known of the insanity of the defendant, it must not be supposed that in every instance the mere fact of such a knowledge being brought home to the person supplying necessaries to a lunatic will prevent him recovering. In *Barter v. Earl of Portsmouth*, though the use of a carriage was, in its legal sense, a necessary for the defendant, it might very well be questioned whether, had the plaintiff known of the Earl's insanity, his supplying such goods would not be held evidence of imposition. But, on the other hand, where the plaintiff boards and provides for an insane person, a knowledge of his real condition is, of course, immaterial (*Nelson v. Duncombe*, 9 *Beav.* 211).

Articles not Necessary. RULE 20.—A person *non compos mentis* will be liable for articles supplied to him other than necessaries when (1) at the time of contracting he appears of sound mind and is not known to be otherwise, (2) when the contract itself is *bonâ fide*, (3) when it is executed in part or in whole,

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and (4) when the parties are incapable of being put *in statu quo* (*Molton v. Camron*, 4 Ex. 17).

Thus: the plaintiff entered into a written contract for the purchase of certain land at a specified price from certain persons, vendors thereof on behalf of the defendant, on the terms and conditions that the plaintiff should forthwith pay a sum of 415*l.* as a deposit on the purchase, &c. The plaintiff paid the deposit at the time of entering into the contract, and an abstract of title was afterwards duly delivered to him, to which no objection was made. At the time the plaintiff entered into the contract he was a lunatic and incapable of understanding its nature; but this the defendant did not know, and the contract on his part was a *bonâ fide* one. Held: that, as the contract was entered into by the defendant, and the money received, fairly and in good faith, and without knowledge of the lunacy, and so far as concerned the deposit, the transaction was completely executed, the plaintiff was not entitled to the return of the money so deposited (*Beavan v. MacDonnell*, 9 Bear. 309).

Whether Contracts Void or Voidable.
RULE 21.—The better opinion would seem to be that contracts entered into by a person *non compos mentis*, are voidable only, and capable of being confirmed should he attain his mental capacity (see the remarks made in *Pollock on Contracts*, p. 82).

SECTION 2.

Contracts by Drunkards.

RULE 22.—A person, even in a state of complete intoxication, may be liable in cases where the contract is necessary for his preservation—as in the case of a supply of actual necessities (*per Alderson, B.*, in *Gore v. Gibson*, 13 *M. & W.* 627). But in respect to other contracts entered into by a man so drunk as not to possess “an agreeing mind,” they are in law considered voidable (*Mathews v. Baxter*, *L. R.*, 8 *Ex.* 132).

It was formerly held that the contracts of a drunkard, whatever might be their nature, were binding upon him, unless, indeed, the drunkenness was caused by the contrivance of the plaintiff himself, or there had been some actual unfair advantage taken of the defendant. The same rule applied in Equity. “A Court of Equity,” it was said by Sir W. Grant, “ought not to assist a person to get rid of any agreement or deed merely upon the ground of his having been intoxicated at the time. I say, merely upon that ground, as if there were, as Lord Hardwicke expresses it, in *Cory v. Cory*, 1 *Ves.* 19, any unfair advantage made of his situation, or . . . any contrivance or management to draw him into drink, he might be a proper object of relief in a Court of Equity” (*Cooke v. Clayworth*, 18 *Ves.* 17). Subsequently, however, a different opinion prevailed,

and in *Pitt v. Smith* (3 Camp. 33), Lord Ellenborough observed, "Intoxication is good evidence upon a plea of *non est factum* to a deed, of *non concessit* to a grant, or *non assumpsit* to a promise" (see also *Fenton v. Holloway*, 1 Stark. 126; *Gore v. Gibson*, 13 M. & W. 623).

SECTION 3.

Contracts by Persons under Duress.

RULE 23.—A person who has been induced to enter into a contract by actual duress, that is to say, by violence or by any threats of violence, is not bound thereby (*Smith v. Montieth*, 13 M. & W. 427; *Chitty*, 186).

Duress per Minas.—Duress by threats is of four kinds: (1) loss of life, (2) loss of member, (3) mayhem, (4) imprisonment (*Chitty*, 187); and any such duress will, if a person has thereby been induced to contract, enable him to avoid his act; but a mere menace to injure goods is not sufficient (*Powell v. Hoyland*, 6 Ex. 67).

SECTION 4.

On Contracts by Convicts and Outlaws.

RULE 24.—A convict, except as herein-after mentioned, is incapable of alienating or charging any property, or of making any contract.

By sect. 8 of the 33 & 34 Vict. c. 23 (the Act which abolished forfeiture on conviction of treason or felony) it is enacted: "No action at law or suit in equity for the recovery of any property, debt, or damage whatsoever, shall be brought by any convict against any person, during the time while he shall be subject to the operation of this Act; and every convict shall be incapable, during such time as aforesaid, of alienating or charging any property, or of making any contract, save as hereinafter provided." (See sect. 30.) Before this statute was passed, it was held that a felon could be sued on a contract made by him, though he was unable to sue (*Macdonald v. Ramsay, Fost. Cr. L. 61*); and it is presumed that this would still be the law in cases not coming under the Act.

Who is a Convict?—The expression convict is defined as being any person against whom, after the passing of the above Act, judgment of death or of penal servitude shall have been pronounced by any court of competent jurisdiction in England, Wales, or Ireland, upon any charge of treason or felony (sect. 6).

The disability mentioned in the above rule does not apply to any convict who is lawfully at large under any licence, and, therefore, during that period a convict may both make contracts and sue thereon (sect. 30).

RULE 25.—All contracts of letting or sale, mortgages, conveyances or transfers of property *bonâ fide* made by the administrator of

a convict, under the powers given him by 33 & 34 Vict. c. 23, shall be binding; and the propriety thereof shall not be called in question by such convict, or by any person claiming an interest in such property by virtue of that act (sects. 16, 17).

Where a person, since the passing of the Act, is convicted of any treason or felony it is lawful for the Crown to commit the custody and management of the property of any such convict to an administrator, in whom all the real and personal property and choses in action of the convict become vested during her Majesty's pleasure. The administrator thus appointed is empowered to pay out of the property the debts and liabilities of the convict, and to make allowances for the maintenance and support of any person dependent upon him, and to do a variety of other acts stated in that statute (see sects. 13, 14, 15, 16, and 18.) By sect. 12, he is further enabled to let, mortgage, sell, transfer and convey any part of the property so vested in him as he shall deem fit.

RULE 26. When a convict has undergone the punishment inflicted on him, or has received the Queen's pardon, he once more regains his capacity to contract (sect. 7).

RULE 27. A person who has been outlawed is incapable of suing on his contracts, but may himself be sued thereon (*Griffith v. Middleton*, *Cro. J.* 425; *MacDonald v. Ramsey*, *sup.*)

SECTION 5.

*Contracts by Bankrupts.***Contracts made before Bankruptcy.**

RULE 28.—The right to sue on the contracts of a bankrupt made by him before his bankruptcy, passes, as a general rule, to the trustee in bankruptcy.

By the Bankruptcy Act 1869 (32 & 33 Vict. c. 71, ss. 15, 17) it is enacted, that all such property as may belong to, or be vested in, a bankrupt at the commencement of the bankruptcy, or may be acquired or devolve on him during its continuance, shall vest in the trustee. The word "property" includes choses in action arising out of contracts relating to the personal estate of the bankrupt (*Beckham v. Drake*, 8 *M. & W.* 846; *Wright v. Fairfield*, 2 *B. & Ad.* 727; See *Hodgson v. Sydney*, *L. R.*, 1 *Ex.* 313; *Morgan v. Steble*, *L. R.*, 7 *Q. B.* 611).

RULE 29.—A trustee in bankruptcy may be sued in that capacity on the unexecuted contracts of the bankrupt should he elect to take the same (*Addison on Con.* 854); but

should such contracts be considered by him onerous and likely to prove unbeneficial to the estate, he may disclaim them (sect. 23).

By section 83 it is provided that the trustee of a bankrupt may sue and be sued by the official name "of the trustee of the property of A. B., a bankrupt."

Contracts by Undischarged Bankrupt. RULE 30.—An undischarged bankrupt is capable of making a contract and also of suing thereon; but should the trustee choose to interfere and take the benefit thereof, he may, as a general rule, do so, and sue accordingly (*Chitty*, 185; *Herbert v. Sayer*, 5 Q. B. 965).

Exception.—"The earnings of a bankrupt by his personal labour, so far as may be necessary for the support of himself and family," are not liable to the claim of the trustee (*Leake*, 128; *Williams v. Chambers*, 10 Q. B. 337).

Effect of Discharge. RULE 31.—A bankrupt who has obtained his discharge is, except in certain cases (see sect. 49), released from liability in respect to all other debts provable under the bankruptcy (sect. 49); nor can he make himself responsible for such

debts by any express promise to pay the same made after adjudication (see 24 & 25 Vict. c. 134, s. 164; *Chitty*, 182).

Since the writing of this rule it has been held in the case of *Jakeman v. Cook* (*L. R.*, 4 *Ex. D.* 26), that a promise by a bankrupt after his discharge, made on a new and valuable consideration, to pay a debt, which by virtue of sect. 49 has been released by such discharge, will be binding upon him.

CHAPTER IV.

CONTRACTS BY CORPORATIONS AND CONTRACTS BY AGENTS.

SECTION 1.

Contracts by Corporations.

RULE 32.—Corporations, though competent to contract, must (except in the cases hereinafter stated) do so under the common seal of the body corporate (*Arnold v. The Mayor of Poole*, 4 M. & Gr. 860; *The Mayor of Ludlow v. Charlton*, 6 M. & W. 815; see *Hunt v. The Wimbledon Local Board*, L. R., 4 C. P. D. 48).

So, in *Arnold v. The Mayor of Poole* (sup.) it was held that no municipal corporation (other than that of London) could appoint an attorney, except under the seal of the corporation.

Exceptions.—(1) When the contract relates either to trivial matters of frequent occurrence, or such as from their nature do not admit of delay, it need not be under seal (*East London Waterworks Company v. Bailey*, 4 Bing. 183).

(2) A company, which is established for the purpose of trading, may make all such contracts as are

of ordinary occurrence in that trade without the formality of a seal (*Per* Montague Smith, J., in *South of Ireland Coll. Co. v. Waddle, L. R.*, 3 C. P. 474).

In that case, Bovill, C. J., observes, "Originally all contracts by corporations were required to be under seal. From time to time certain exceptions were introduced, but these for a long time had reference only to matters of trifling importance and frequent occurrence, such as the hiring of servants, and the like. But in progress of time, as new descriptions of corporations came into existence, the courts came to consider whether these exceptions ought not to be extended in the case of corporations created for trading and other purposes. At first there was considerable conflict, and it is impossible to reconcile all the decisions on the subject. But it seems to me that the exceptions created by the recent cases are now too firmly established to be questioned by the earlier decisions, which, if inconsistent with them, must, I think, be held not to be law. These exceptions apply to all contracts by trading corporations entered into for the purpose for which they were incorporated. A company can only carry on business by agents and managers, and others, and if the contracts made by these persons are contracts which relate to objects and purposes of the company, and are not inconsistent with the rules and regulations which govern their acts, they are valid and binding upon the company though not under seal. It has been urged that the exceptions to the general rule are still limited to matters of frequent occurrence and small importance;

the authorities, however, do not sanction that argument."

(a) Thus, a company incorporated for the purpose of trading as shipowners were sued for the non-performance of a contract not under seal, by which they had undertaken to proceed to a certain port and bring back a disabled vessel. Held, on demurrer, that the corporation being a trading one, and incorporated for a specific purpose, the company was bound by the contract as being made in furtherance of the purpose for which the corporation was formed (*Henderson v. The Australian Steam Navigation Co.*, 5 E. & B. 409).

(b) Again, a company incorporated for the working of collieries contracted with an engineer for the erection of a pumping-engine and machinery for that purpose, and paid him part of the price. In an action by the company against the engineer for a breach of contract, in refusing to deliver the engine and machinery, it was held that the action was maintainable though the contract was not under seal (*The South of Ireland Colliery Co. v. Waddle, L. R.*, 3 C. P. 463).

(c) But where a company was incorporated for the purpose of working *copper* mines and selling copper ore, and the action was brought by the corporation for the value of certain *iron rails* supplied to the defendant, it was held not to be maintainable.

"Had the subject matter of the contract been *copper*," it was said, "or, if it had been shown in any way to be incidental or auxiliary to carrying on the business of copper miners, the contract would have

been binding, although not under seal. But the iron rails, the subject-matter of this contract, were not shown to have any connection with the business of copper miners" (*The Copper Miners' Co. v. Fox*, 16 Q. B. 229).

So long as the contract is within the scope of the object for which the company was incorporated the magnitude or insignificance of its subject-matter is immaterial (*The South of Ireland Colliery Co. v. Waddle, sup.*).

(3) It is possible that where a corporation has performed its part of the contract, and the contractee has reaped and enjoyed the benefits thereof, it would be entitled to sue thereon though such contract was not made by deed.

So, it has been held that a corporation may maintain *assumpsit* for the use and occupation of land held under them (*The Mayor of Stafford v. Till*, 4 Bing. 75).

There seems to be considerable doubt, however, as to the soundness of this rule, and the authorities are more or less conflicting. In the Court of Queen's Bench, in *Church v. Imperial Gas Light Co.*, 6 A. & E. 846, it was decided that the right of a corporation to sue on a contract not under seal was the same when such contract was executed as it was when executory (see also *London Dock Co. v. Linnot*, 8 E. & B. 347).

(4) The better opinion would seem to be that when the other party has performed his part of the contract, and the corporation has derived the benefit therefrom, he may sue such corporation, notwithstanding

that the contract was not under seal (*Nicholson v. Bradfield Union, L. R.*, 1 Q. B. 620; *Clarke v. Cuckfield Union*, 21 L. J., Q. B. 349; but see *Hunt v. The Wimbledon Local Board, sup.*). According to *Diggle v. The London and Blackwall Railway Co. (sup.)* a mere adoption of the work done will not suffice: it is necessary also that the work itself comes within the scope of the object for which the company was incorporated (see also *Lamprell v. Guardian of Billericay Union*, 3 Ex. 283).

SECTION 2.

On the Contracts of Agents.

Definition.—"Agency is founded upon a contract either express or implied, by which one of the parties confides to the other the management of some business to be transacted in his name, or on his account, and by which the other assumes to do the business and render an account of it" (*Kent's Com.*, 10 Ed., vol. 2, p. 848).

Kinds of Agencies.—Agency, in respect to the extent of the authority vested in the agent, is of three kinds:—

(1) A particular or special agency—that is to say, an agency wherein the agent is authorized to do some particular or special act.

(2) A general agency—or one wherein the agent is authorized to do every act that can reasonably be said to come within the scope of some particular trade or business.

(3) An universal agency—or one in which the

agent is authorized to do every act that his principal is by law competent to depute to another.

The case of universal agency is seldom, if, indeed, ever met with; and, in the course of the present section, I purpose dealing only with the two former descriptions.

How an Agent may be Appointed.

RULE 33.—For the purpose of entering into a simple contract, an agent may be appointed by word of mouth only, and in some cases, as has been stated, that relationship may be created by mere implication (p. 25). By sections 1, 2 and 3 of the Statute of Frauds (relating to the creation, surrender or assignments of freeholds and leaseholds) it is enacted, that the agent, before he can bind his principal by signing on his behalf, must be appointed by writing.

“The authority to *contract* for a lease,” remarks Mr. Chitty in a note on page 190, “need not be in writing, though the authority to sign the lease or instrument by which the *interest passes* must be.”

Who may be Agents. **RULE 34.**—It may be said, generally, that all persons are capable of being agents; nor does it follow that because a person is not competent to contract for himself, he is therefore disabled from con-

tracting on behalf of another. A principal, however, has no remedy against an agent who is incompetent to contract in his own right.

Consequently, an infant may contract as agent for another, as also may a married woman (*Lindus v. Bradwell*, 5 C. B. 583), or an outlaw.

Agents under the Statute of Frauds.
(Sub-rule).—*In contracts, coming under the Statute of Frauds, the agent, who is to bind his principal by signing on his behalf, must be some third person, and not the other contracting party* (*Sharman v. Brandt*, L. R., 6 Q. B. 720).

An auctioneer wrote down the defendant's name by his authority, opposite to the lot purchased, which was in value above 10*l.*, so that the 17th section of the Statute of Frauds applied. Held, on an action being brought in the name of the auctioneer, that the entry in such book was not sufficient to take the case out of the statute (*Farebrother v. Simmons*, 5 B. & A. 333).

Had the auctioneer's clerk signed in the presence of the bidder, or by his authority, that would have been sufficient (*Bird v. Boulter*, 4 B. & A. 443); nor could any objection have been raised if the auctioneer had not been suing as the other contracting party, for there is nothing to prevent his being agent for both parties (*Farebrother v. Simmons*, *sup.*).

Liability of Principal on the Authorized Contracts of his Agents. RULE 35.—A

principal is liable on all contracts entered into by his agent which he has expressly authorized him to make and are made in accordance with that authority.

This rule is in accordance with the maxim "*Qui per alium facit per seipsum facere videtur*" (Coke upon *Littleton*, p. 258).

Liability of Principal on the Unauthorized Contracts of his Agents. RULE 36.—

"If a particular agent exceed his authority, his principal is not bound by what he does; whereas if a general agent exceed his authority his principal is bound, provided what he does is within the ordinary and usual scope of the business he is deputed to transact" (*Sm. on Cont.*, p. 375, 6th ed.); and provided the contractee has had no notice of the excess of authority (*Trueman v. Loder*, 11 A. & E. 589).

The distinction thus drawn between a special and a general agency is obvious. Where a person has been authorized by another to act in a particular way, or to enter into a particular contract, and he is appointed agent simply and solely for that one purpose, then it is the duty of persons dealing with such agent to ascertain the extent of his authority (*Fenn v. Harrison*, 3 T. R. 762). But where a person allows another to carry on some particular business on his behalf, he thereby impliedly authorizes him to do all such acts as are generally done in that business,

and as can reasonably be considered within the scope thereof, and the public, dealing with such a person, have a right to conclude that he is only doing what he has been authorized to do. Consequently, should it happen that, in point of fact, the agent has been acting beyond his authority, or without any at all, the principal must be held liable, in accordance with the maxim, that where one of two innocent persons must suffer by the act of a third, he who has enabled such third person to occasion the loss must sustain it (*per Ashurst, J.*, in *Lickbarrow v. Mason*, 2 T. R. 70).

(1) A. employed B. to manage his business, and to carry it on in the name of B. and Co. The drawing and accepting of bills of exchange was incidental to the carrying on of such business, but it was stipulated between them that B. should not draw or accept bills. B. accepted a bill in the name of B. and Co. Held that A. was liable on the bill in the hands of an indorsee, who took it without any knowledge of B. or the business (*Edmunds v. Bushell*, L. R., 1 Q. B. 97).

“It would be very dangerous to hold that a person, who allows an agent to act as a principal in carrying on a business, and invests him with an apparent authority to enter into contracts incidental to it, could limit that authority by a secret reservation” (*per Mellor, J.*)

(2) The servant of a private person intrusted to sell and deliver a horse on one particular occasion has not by law any authority to bind his master by giving a warranty. Therefore, should such servant

in the course of the sale give a warranty with the horse, when not authorized by his master to do so, the master will not be bound thereby (*Brady v. Todd*, 9 C. B., N. S. 592).

(3) But where the servant is in the employment of a *horsedealer*, then there is an implied authority given him to bind his master by a warranty; and the master would be liable for such warranty, even though his servant had express orders not to warrant (*Howard v. Steward*, L. R., 2 C. P. 148).

(4) It must be borne in mind that, even in the case of a general agency, the principal is only liable for acts done within the scope of the business or employment wherein he has instructed his agent to act. Accordingly, where a station master contracted, without authority, for surgical attendance on some passengers who had been injured in an accident, it was held that the Company was not liable; such contract not being incidental to the employment of a station master (*Cox v. The Midland R. Co.*, 3 Ex. 268).

Factors' Acts (5 & 6 Vict. c. 39; 6 Geo. 4, c. 94).—Before the passing of these acts, an agent, intrusted with goods for the purpose of selling them, could not bind his principal by pledging the same (*Paterson v. Tash*, 2 Str. 1178). By sect. 1 of 5 & 6 Vict. c. 39, the law is now altered, and it is enacted, that—

From and after the passing of that act, any agent who shall thereafter be intrusted with the possession of goods, or of the documents of title to goods, shall be

deemed and taken to be the owner of such goods and documents, so far as to give validity to any contract by way of pledge, lien, or security bonâ fide made by any person with such agent intrusted as aforesaid, as well for any original loan or advance made upon the security of such goods or documents, as also for any further or continuing advance in respect thereof, and such contract shall be binding upon the owner of such goods, and all other persons interested therein, notwithstanding the person claiming such pledge or lien may have had notice that the person with whom the contract is made is only an agent.

In reference to this act, the following points should be remembered :—

(1) The section just cited requires an *agent*; a mere clerk or servant is not sufficient (*Lamb v. Attenborough*, 1 B. & S. 831).

(2.) The agent must have been *intrusted* with the possession of the goods, or the documents of title thereto. A person who has obtained goods under false pretences has no power to bind their true owner by a pledge thereof (*Higgins v. Burton*, 26 L. J., Ex. 342; see also, as to what is an *intrusting* under the statute, sect. 4; *Sheppard v. Union Bank of London*, 7 H. & N. 661; *Vickers v. Hertz*, L. R., 2 Sc. App. 113).

(3) When the pledge is made in consideration of a past debt, the owner will not be bound (sect. 3), nor will he where the pledgee is aware that the agent has no authority to pledge the goods (sect. 3). But, as has been stated, the mere fact of the pledgor being known to be an agent will not take the person having

such knowledge out of the protection of the statute (sect. 1).

(4) Where the consideration for the pledge is the delivery of other goods, or documents of title, whereon the person who delivers them possesses a lien for a past debt or advance, an absolute lien, to the extent of the value of the goods delivered, is acquired by the pledgee. (See *Chitty's Statutes*, 5th ed., vol. 2, p. 56.)

(5) The goods are considered to be in the possession of the agent, not only where they are in his own custody, but also where they are held by some person on his behalf and subject to his control (sect. 4). See the Factors' Act of 1877 (40 & 41 Vict. c. 39).

When the Principal may be sued.

RULE 37.—Supposing the contract to be one that in its nature is binding upon the principal, he may (subject to what is hereafter stated) be sued thereon in any of the three following cases:—(1) where his agent contracts in his own name without disclosing that he has a principal; (2) where he states that he has a principal but does not disclose his name; and (3) where he makes the contract stating who his principal is (*Thomson v. Davenport*, 9 B. & C. 86; *Paterson v. Gandesequi*, 15 East, 62).

Altering of Accounts. Sub-rule 1.—*Where the principal is not disclosed, or disclosed but his name not mentioned, he cannot be sued, if the state of accounts*

between himself and his agent would thereby be altered to his (the principal's) prejudice; or, if there is anything in the transaction making it inequitable that he should be held liable (Thomson v. Davenport, sup.; Smyth v. Anderson, 7 C. B. 21).

In *Armstrong v. Stokes* (L. R., 7 Q. B. 598) it was held that a vendor dealing with a person he believed to be a principal, and to whom he gave credit, cannot sue the real principal, when discovered, if the latter has *bonâ fide*, and in the ordinary course of business, paid his agent for the goods supplied, at a time when the vendor still gave credit to the agent, and knew no one else as principal.

Where there has been an Election. Sub-rule 2.—*Where the contract is made in the principal's name, so that the other contracting party had full opportunity of electing to whom he should give credit, and he elects to give such credit to the agent, he cannot afterwards sue the principal (Thomson v. Davenport, sup.).*

In that case, Lord Tenterden remarked, "If at the time the seller knows not only that the person who is nominally dealing with him is not the principal but agent, and also knows who the principal really is, and, notwithstanding all that knowledge, deals with him, and him alone, then the seller cannot afterwards, on the failure of the agent, turn round and charge the principal, having once made his election at the time when he had the power of choosing between him and the other."

The fact that the buyer knew that there was a principal does not give him the means of making his

election, unless he was also aware who he really was (*Thomson v. Davenport, sup.*). It is a question for the jury whether the plaintiff had elected to give credit to the agent or the principal (*Calder v. Dobell, L. R.*, 6 C. P. 486; *Curtis v. Williamson, L. R.*, 10 Q. B. 57).

When the Agent may be sued. RULE 38.
—An agent who contracts as such for a known principal cannot, as a rule, be sued (*Thomas v. Edwards, 2 M. & W.* 215; see *Fairley v. Fenton, L. R.*, Ex. 169). But when he enters into a contract as principal; or (in general) as agent, but without disclosing who his principal is, the rule is otherwise (*Thomson v. Davenport, sup.*).

In the following cases, a person contracting as agent may be sued, even though he has contracted in his representative capacity, and has stated the name of his principal.

(1) Where he has expressly undertaken to be liable (*Parker v. Winlow, 7 E. & Bl.* 942; see *Southwell v. Bouditch, L. R.*, 1 C. P. D. 344; *Fleet v. Murton, L. R.*, 7 Q. B. 129).

(2) If the so-called agent has, in point of fact, no principal, he is in law considered to be the principal, and is liable on the contract (*Kelner v. Baxter, L. R.*, 2 C. P. 174; but see *Smout v. Ilbery, post, p. 59*).

(3) Where, without the knowledge of the contractee, he exceeds his authority.

In this case, it would seem, that he would not be liable upon the contract itself (*Jenkins v. Hutchinson,*

13 Q. B. 744); but, if he *knowingly* misrepresented the extent of his authority, on the fraudulent misrepresentation (*Randell v. Trimen*, 18 C. B. 786); and if he did not know that he was doing this, then on the implied contract that he had the authority he represented himself as possessing (*Collen v. Wright*, 7 E. & Bl. 301). This latter action could also be maintained where he had been guilty of fraud (*Randell v. Trimen*, *sup.*).

In every case in which an agent, not incapable of contracting on his own account, exceeds his authority, and thereby occasions loss to his principal, he will be liable to such principal (*Barron v. Fitzgerald*, 6 Bing. N. C. 201).

Parol Evidence to relieve Agent's Liability. Sub-rule 1.—*An agent who signs a written contract in his own name, and not on behalf of his principal, cannot free himself from liability on such contract, by showing that the contractee knew that he was only an agent when he signed the written agreement* (*Higgins v. Senior*, 8 M. & W. 834). *He may show, by way of equitable plea, however, that when the contract was made it was the intention of the plaintiff and himself that he should not be rendered answerable as principal* (see *Chitty*, 207); *or that it was so expressly stipulated* (*Wake v. Hassop*, 6 H. & N. 768).

When the Principal may sue. RULE 39.
—Where a simple contract is made by an agent (which is not by bill of exchange or promissory note, signed by the agent in his

own name), the principal may sue thereon, (1) where at the time of the contract he was fully disclosed, (2) where he was disclosed but his name not mentioned, and (3) where the agent contracted in his own name (*Spurr v. Cass*, *L. R.*, 5 *Q. B.* 659; *Phelps v. Protheroe*, 16 *C. B.* 370). In the latter case the defendant is entitled to be placed in the same position at the time of the disclosure of the real principal, as if the agent had been the contracting party in point of fact (*Sims v. Bond*, 5 *B. & Ad.* 395).

Thus, where goods were sold to the defendant by the factor to the plaintiff, the defendant, on an action being brought by the plaintiff for the value of such goods, was held to be entitled to set off a debt due to him from the factor (*George v. Clagget*, 7 *T. R.* 359).

“Where a factor, dealing for a principal, but concealing that principal, delivers goods in his own name, the person contracting with him has a right to consider him, to all intents and purposes, as the principal; and, though the real principal may appear and bring an action upon that contract against the purchaser of the goods, yet that purchaser may set off any claim he may have against the factor in answer to the demand of the principal” (*per Mansfield*, *C. J.*).

When the Agent may sue. RULE 40.—
An agent who has made a contract in his own name and without disclosing the fact that he

has a principal; or who has disclosed the fact but not stated who his principal is, may sue thereon (*Short v. Spackman*, 2 B. & Ad. 762; *Sims v. Bond*, *sup.*). But where he contracts as agent in the ordinary way he cannot do so, except as stated in the next paragraph.

Exception. Sub-rule.—Where the agent has some beneficial interest or special property in the subject-matter of the contract, and his principal does not elect to sue, he may do so, notwithstanding that the contract was made in the principal's name (*Snee v. Prescott*, 1 Atk. 245; *Sadler v. Leigh*, 4 Camp. 196; see *Robinson v. Rutter*, 4 E. & B. 954; *Grice v. Kemrick*, L. R., 5 Q. B. 340).

Thus, a carrier, a factor, an auctioneer, &c., have a special property in the goods of their principal.

Ratification. RULE 41.—A person may ratify a contract made by another professing to act on his behalf, but without his consent, and thereby enable himself to sue and be sued thereon (*Foster v. Bates*, 12 M. & W. 226). “The subsequent ratification is equivalent to a prior command, and the great maxim of agency, *Qui facit per alium facit per se*, has a retrospective effect” (*Sum. on Con.* p. 390).

Delegatus non potest Delegare. RULE 42.—An agent cannot delegate his authority to another except (1) when compelled to do so by necessity, or (2) when allowed to do so by some

usage of trade, or (3) by the consent of his principal (*Trueman v. Loder*, 11 A. & E. 589).

So an agent of an agent cannot bind the principal by any act he may do, or by any contract he may make.

How an Agency may be Terminated.

RULE 43.—The authority of an agent may be terminated either (1) by the death or bankruptcy of himself or his principal, (2) by express revocation, (3) by renunciation, (4) by the performance of the act he was appointed to do, or (5) by the lapse of time (if any) during which he was to act (see *Chitty*, 191); (6) by marriage of the principal, if a *feme sole*.

In respect to revocation of an agent's authority by the death of the principal, the leading case of *Smout v. Ilbery*, 10 M. & W. 1, should be consulted. In that case a butcher had been accustomed to supply meat to A.'s wife during his residence abroad. A. having died, an action was brought against the wife for the price of certain meat supplied during one of her husband's visits abroad. But it was held not to be maintainable, on the ground that she had received no tidings of her husband's death, and had *bonâ fide* believed she still had authority to pledge his credit. On the other hand, it was decided that A.'s executors were not liable for the meat sold after his death, as his wife's authority to act on his behalf was thereby terminated.

CHAPTER V.

CONTRACTS BY PARTNERS AND PARTNERSHIP
GENERALLY.

What is a Partnership.—Partnership, often called co-partnership, is usually defined to be a voluntary contract between two or more persons to place their money, effects, labour, skill, or some or all of them, in lawful commerce or business, with the understanding that there shall be a community of the profits thereof between them (*Story on Part. 4*).

Quasi Partnership.—Besides the above kind of partnership, usually termed “True Partnership,” there is, what is called, “Quasi Partnership,” that is to say, a partnership which does not exist in fact, but only *quoad* third parties (see *Lindley*, 34).

How a True Partnership may be Created.

RULE 44.—A partnership contract may, as a rule, be entered into without any formality. Neither is a writing, deed, nor registration necessary (*Lind. on Part. pp. 87—89*).

Exceptions.—Among the most important exceptions to this rule may be stated the following:—

(1) Under the 4th section of the Statute of Frauds, a partnership that is to continue for a longer period

than a year must be in writing (*Chitty*, 210; see, however, *McKay v. Rutherford*, 13 *Jur.* 21). But, it would appear, a partnership, having for its purpose the purchasing and selling of land, may be evidenced by parol (*Dale v. Hamilton*, 5 *Hay*, 369).

(2) By the Companies Act, 1862 (25 & 26 Vict. c. 89), it is enacted, that no partnership of more than ten persons shall be formed, after the commencement of that act, for the purpose of banking, unless registered under the act, or formed under an act of parliament, or letters patent: and no company consisting of more than twenty persons shall be formed, unless registered under the act, or formed in pursuance of some act of parliament, or of letters patent, unless it be a mining company within the jurisdiction of the stannaries.

It is not purposed here to consider the laws relating to joint-stock companies, and in the present chapter I must be understood as restricting my remarks to ordinary partnership.

How a Quasi Partnership can be Created.

RULE 45.—A quasi partnership may be created either by a person participating in the profits of a concern, or by his holding himself out as a partner therein.

Participation in Profits. Sub-rule 1.—*A person, who shares in the profits of a concern, is prima facie presumed to be a partner therein; but this presumption may be rebutted by showing that from the whole*

agreement of the parties it was not their intention that a partnership should be constituted (Molco, March & Co. v. The Court of Wards, L. R., 4 P. C. 435).

It was formerly held that, in respect to third parties, a person who participated in the profits of a concern became *ipso facto* a partner, because "he who takes the general profits of a partnership," it was said, "must of necessity be made liable to the losses" (see *Waugh v. Carrer*, 2 H. & Bl. 236; 1 Sm. L. Ca. 922). This rule, however, gradually became much modified, and, though a participation in the profits raises a *prima facie* presumption of such a relationship (*Pooley v. Drirer*, L. R., 5 Ch. D. 458), it is now clearly settled, that such presumption is capable of being rebutted; and that the saying, "because there is a participation of profits, there must of necessity be a partnership," is incorrect (*Cox v. Hickman*, 8 H. L. Ca. 268). A test for seeing whether there is a partnership of this nature has been stated to be, "was there the existence of such a relation between the parties that each of them is a principal and each an agent for the other?" (*Per O'Brien, J., in Shaw v. Galt*, cited in *Holme v. Hammond*, *infra*; but see *Pooley v. Drirer*, *sup.*).

"It is said," observed Lord Cranworth in *Cox v. Hickman*, "that the test, or one of the tests, whether a person, not ostensibly a partner, is, nevertheless, in contemplation of law a partner, is whether he is entitled to participation in the profits. This, no doubt, is in general a sufficiently accurate test; for a right to participate in profits affords cogent, often conclusive, evidence that the trade in which the profits have been

made was carried on in part for, or on behalf of, the person setting up such a claim. But the real ground of the liability is that the trade has been carried on by persons acting on his behalf. Where that is the case, he is liable to the trade obligations, and entitled to the profits, or to a share of them. It is not strictly correct to say that his right to share in the profits makes him liable to the debts of the trade. The correct mode of stating the proposition is to say that the same thing that entitles him to the one makes him liable to the other, namely, the fact that the trade has been carried on on his behalf, *i.e.* that he stood in the relation of principal toward the persons acting ostensibly as the trader by whom the liabilities have been incurred, and under whose management the profits have been made."

28 & 29 Vict. c. 86.—By this act it is enacted that—(1) The advance of money by way of loan to a person engaged, or about to engage, in any trade or undertaking, upon a contract in writing with such person, that the lender shall receive a rate of interest varying with the profits, or shall receive a share of the profits arising from the carrying on of such trade or undertaking, shall not of itself constitute the lender a partner with the person or persons carrying on such trade or undertaking, or render him responsible as such.

(2) No contract for the remuneration of a servant or agent of any person engaged in any trade or undertaking by a share of the profits of such trade or undertaking, shall of itself render such servant or

agent responsible as a partner therein, nor give him the rights of a partner.

(3) No person being the widow or child of the deceased partner of a trader, and receiving by way of annuity a portion of the profits made by such trader in his business, shall by reason only of such receipt be deemed to be a partner of, or to be subject to any liabilities incurred by, such trader.

(4) No person receiving, by way of annuity or otherwise, a portion of the profits of any business in consideration of the sale by him of the goodwill of such business, shall by reason only of such receipt be deemed to be a partner of, or to be subject to the liabilities of the person carrying on such business.

Effect of the Act.—The effect of the above act is that, in respect to the protected classes mentioned therein, the sharing of profits shall be no evidence at all of a contract of partnership; whereas with regard to other persons, it is, as we have seen, *prima facie*, though not conclusive, evidence thereof (*Holme v. Hammond*, L. R., 7 Ex. 218; see *Pooley v. Driver*, *sup.*).

Holding Out. Sub-rule 2.—*A person who by lending his name to a concern, or otherwise, induces another to believe him to be a partner therein, is liable as such to that other, should he act on the faith of that representation.*

“If it could be proved,” said Lord Wensleydale, in *Dickinson v. Walpy* (10 B. & C. 140), “that the defendant had held himself out to be a partner, not

to the world, for that is a loose expression, but to the plaintiff himself, or under such circumstances of publicity as to satisfy a jury that the plaintiff knew of it, and believed him to be a partner, he would be liable to the plaintiff in all transactions in which he engaged and gave credit to the defendant, upon the faith of his being such partner. The defendant would be bound by an indirect representation to the plaintiff arising from his conduct, as much as if he had stated to him directly and in express terms that he was a partner, and the plaintiff had acted upon that statement."

Nominal Partner.—A person who thus lends his name to a concern without having any real interest therein, is called a nominal partner.

Effect of Plaintiff's Knowledge of Defendant's Position.—It has been held that a nominal partner is liable, even though the plaintiff, when he gave credit to the firm, was not aware of his name being so used (*Young v. Axtell*, cited in 2 *H. & Bl.* 242); and, also, that he cannot exempt himself from liability by showing that the fact that he possessed no interest in the firm, was known to the plaintiff at the time of his dealing therewith (see *Brown v. Leonard*, 2 *Chitty*, 120; and also *Lindley*, p. 48).

The former of these propositions, however, has been considerably questioned, and may now be looked upon as unmaintainable (see remarks by Mr. Smith, in *S. L. Ca.* 952, and *Chitty on Con.* 216); while the latter has been dissented from in *Alderson v. Pope* (1 *Camp.*

404, n.), and *Batty v. MacCundie*, (3 C. P. 202). The reason why a nominal partner might still be liable, notwithstanding it being known that he had no interest in the concern, is that the lending of his name "might justify the belief that he is willing to be responsible to those who may be induced to trust him for payment" (*Lind. p. 48*).

How far Contracts by Partners are binding among themselves. RULE 46.—Partners may stipulate among themselves that some of them only shall enter into particular contracts or into any contracts, or that as to certain of their contracts none shall be liable except those by whom they are actually made (*per Lord Cranworth*, 8 H. L. Cu., 304, 305), and, generally, may make what arrangements they may choose as to the management of the affair.

An agreement whereby one person is to receive the whole of the profits arising out of a concern would not create a partnership at all, community of profits being an essential element in such a contract (*Sm. on Con. 413*).

The effect of these and similar agreements between partners as regards third parties, is (as will be seen in the next rule) widely different.

Dormant Partner.—A dormant partner is a partner who participates in the profits of a concern, but who does not appear to the world as a partner (see *Sm. Merc. Law*, p. 20).

To what Extent one Partner is liable for the Contracts of his Co-Partners. RULE 47.

—Every partner, acting on behalf of the firm, can bind his co-partners by contracts entered into by him, though without the authority of such co-partners, provided (1) the contract comes within the scope of the ordinary business of the firm; and (2) that notice of such want of authority was not brought to the knowledge of the party with whom the contract was made. When the contract is one which the partner is authorized to make by the others, it need hardly be said they will be bound thereby.

(1) Thus, it is clearly settled that one partner in a trading firm can bind the others by borrowing money for partnership purposes (*Brown v. Kidger*, 3 *H. & N.* 853; *Rothwell v. Humphreys*, 1 *Esp.* 406).

(2) So, again, supposing the partnership is a trading partnership, a partner can bind his co-partners by accepting, drawing, or indorsing bills of exchange, though he be expressly forbidden by the firm to enter into such contracts (*Kirk v. Blurton*, 9 *M. & W.* 284; *Forbes v. Marshall*, 11 *Ex.* 166). But, where the firm is not a trading one, as in the case of a firm of solicitors, there is no implied authority for one of the partners to bind the others by drawing, accepting, or indorsing such instruments (*Garland v. Jacomb*, *L. R.*, 8 *Ex.* 216).

(3) A trading firm is bound by one of its partners

releasing a debt due to it (*Stead v. Salt*, 3 Bing. 101), or by the sale, or insurance, of the partnership goods by one of its members (*Fox v. Hanbury*, Cowper, 445; *Hooper v. Lusby*, 4 Camp. 66).

(4) A partner has no implied authority to bind his co-partners by a submission to arbitration (*Adams v. Bankart*, 1 Cr. M. & R. 681), nor, as a rule, by executing a deed (*Perry v. Jackson*, 4 T. R. 516), nor by giving a guaranty (*Duncan v. Lowndes*, 3 Camp. 481).

(5) But, as above stated, if the plaintiff when he contracted with one of the partners was aware that such members had no authority to contract on behalf of the firm he cannot recover. In *Gallwey v. Mathew* (1 Camp. 402; 10 East, 264) the defendants M. and S. were partners. S., by a public notice, warned all persons not to give credit to M. on his (S.'s) account, such notice also stating that he would not be answerable for bills or notes drawn by M. in the firm's name. It was proved that G., the plaintiff, had seen this. Held, that he could not recover from S. the money due on a promissory note, drawn by M. in the name of the firm.

"The general authority of one partner to draw bills or promissory notes to charge another is only an implied authority, and that implication was rebutted in this instance by the notice given by Smithson, who is now sought to be charged, which reached the plaintiff, warning him that Mathew had no such authority. It is not essential to a partnership that one partner should have power to draw bills and notes in the partnership firm to charge the others;

they may stipulate between themselves that it shall not be done; and, if a third person, having notice of this, will take such a security from one of the partners, he shall not sue the others upon it in breach of such stipulation, nor in defiance of a notice previously given to him by one of them that he will not be liable for any bill or note signed by the others" (per Lord Ellenborough).

Ratification. Sub-rule.—*Partners, not otherwise liable on a contract made by a co-partner, may become so by subsequently ratifying and confirming the same* (Duncan v. Lowndes, 3 Camp. 478).

How a Partnership may be Dissolved.
RULE 48.—A partnership may be dissolved in any of the following ways: (1) by mutual consent; (2) by the death of one of the partners; (3) where the partnership is constituted for a particular period or purpose by the termination of that period, or by the object of the partnership being accomplished; (4) by the impossibility of proceeding with the concern, as when it becomes insolvent; (5) by the transfer of a partner's interest, as, for instance, by bankruptcy; (6) by the partnership subsequently becoming illegal; and, lastly (7), by the decree of a Court of Equity (*Lindley*, 231; *Chitty*, 236).

Notice of Retirement. Sub-rule.—*A partner, who, on his retirement from the partnership, gives notice thereof in the Gazette, is freed from any liability arising out of contracts made by the firm, subsequently to his retirement, with persons who were not formerly its customers (Farrer v. Deflinne, 1 C. & K. 580; Godfrey v. Turnbull, 1 Esp. 371). But to discharge himself from responsibility arising out of contracts entered into with customers, an express notice must be given, unless it can be proved that the customer knew of the retirement (Hart v. Alexander, 7 C. & P. 746). In both cases the retired partner continues liable on contracts made before his withdrawal.*

A dormant partner, except as regards persons who knew him to be a partner, is not obliged to give notice of his retirement to save himself from liability on contracts entered into after that event (*Farrer v. Deflinne, sup.*).

PART II.
THE CONSTITUENT PARTS OF A CONTRACT
AND
ILLEGAL AND FRAUDULENT CONTRACTS.

CHAPTER I.—THE CONSENT OF THE PARTIES.

II.—THE CONSIDERATION.

III.—THE PROMISE.

IV.—CONTRACTS ILLEGAL BY COMMON LAW.

V.—CONTRACTS ILLEGAL BY STATUTE.

VI.—FRAUDULENT CONTRACTS.



PART II.

THE CONSTITUENT PARTS OF A CONTRACT.

CHAPTER I.

THE CONSENT OF THE PARTIES.

HAVING thus considered the parties to a contract, we now come to deal with the contract itself, that is to say, to discuss each of those particular factors that must exist before there can be a valid simple contract. They are these—

1. The Consent of the Parties :
2. The Consideration :
3. The Promise.

I.—*Consent.*

Mutuality of Consent. RULE 49.—In order that there may be a binding simple contract, it is necessary that the proposal of the one party should be assented to and accepted by the other in the exact terms in

which it is made: for until it is so, the parties are never *ad idem*, or “of one mind,” as it is termed, and the proposal can be retracted (*Jackson v. Galloway*, 6 *Scott*, 786; see *Chitty*, 8).

“A contract,” it has been said, “includes a concurrence of intention in two parties, one of whom promises something to the other, who, on his part, accepts such promise. A pollicitation is a promise not yet accepted by the person to whom it is made. *Pollicitatio est solius offerentis promissum*. A pollicitation, according to the rules of mere natural law, does not produce what can be properly called an obligation, and the person who has made the promise may retract it any time before it is accepted: for there cannot be any obligation without a right being acquired by the person in whose favour it is contracted against the party bound. Now as I cannot by the mere act of my own, transfer to another a right in my goods, without a concurrent intention on his part to accept them; neither can I by my promise, confer a right against my person, until the person to whom the promise is made has, by his acceptance of it, concurred in the intention of acquiring such right” (*Pothier on Obl.*, p. 1, c. 1, s. 1, art. 2).

Examples:—

(1) An *unqualified* allotment of shares was applied for in a company about to be formed, and, when the allotment was made, there was a condition attached thereto that the shares were to be “not transferable.” Held, that there was no binding contract between

the applicant and the company, as the acceptance contained a proviso not stated in the proposal (*Duke v. Andrews*, 2 *Ex.* 290).

(2) A. agreed in writing to give twenty guineas for a mare, if she were warranted to be sound and quiet in harness; the plaintiff replied warranting the animal sound and quiet in *double* harness. Held, that the correspondence evidenced no contract between the parties (*Jordan v. Norton*, 4 *M. & W.* 155).

(3) The plaintiff, who proposed to enter the service of the defendant, wrote as follows:—"Referring to my conversation with you, I have now the pleasure to state my willingness to enter the service of your firm for one year on trial, on the following terms, viz., a list of merchants to be regularly called on by me, to be made, and corrected as occasion requires. My salary for the year to be 120*l.*, and, in addition, a commission of $\frac{1}{3}$ *d.* per piece on all sales effected, or orders taken, by myself, etc. If the terms herein specified are in accordance with your ideas, kindly confirm them by return, and I will prepare to enter on my duties in your warehouse on Monday morning next." The defendant, on the following day, replied:—"Yours of yesterday embodies the substance of our conversation and terms. If we can define some of the terms a little clearer it might prevent mistakes; but I think we are quite agreed on all. We shall, therefore, expect you on Monday. I have made a list of customers, which we can consider together." Held, that these two letters did not constitute a binding contract in writing, the defendant's

answer not being an absolute and unqualified acceptance of the plaintiff's offer (*Appleby v. Johnson*, *L. R.*, 9 *C. P.* 158).

(4) The agents of A., who had a lease of premises, No. 22, Belgrave Road, to dispose of, wrote to B. as follows:—"We have been requested by Mrs. D. to find her a lodging-house in this neighbourhood; and we forward for your approval particulars of two which we think most likely will suit." Inclosed were particulars of two houses, one of which is No. 22, Belgrave Road, the terms for which were stated to be—"Premium 250 guineas; rent 80*l.*; and certain fixtures and planned furniture to be taken at a valuation." B. replied as follows:—"I have decided on taking No 22, Belgrave Road, and have spoken to my agent, Mr. C., of &c., who will arrange matters with you, if you will put yourselves in communication with him. I leave town this afternoon, so if you have occasion to write please address to Cirencester." Held, that these two letters did not constitute a complete agreement binding on the defendant (*Stanley v. Dowdeswell*, *L. R.*, 10 *C. P.* 102).

On this subject the following cases may be also consulted:—*In re Rolling Stock Co. of Ireland*, *Shakleford's case* (*L. R.*, 1 *Ch.* 567); *In re Universal Banking Co.*, *Roger's case* (*L. R.*, 3 *Ch.* 633); *In re Patent Paper Manufacturing Co.* (*L. R.*, 5 *Ch.* 294); *In re Leeds Banking Co.* (*L. R.*, 1 *Eq.* 225); *Jackson v. Turquand* (*L. R.*, 4 *H. L.* 305); *In re Richmond Hill Hotel Co.* (*L. R.*, 2 *Ch.* 527).

Acceptance by Letter. RULE 50.—Where

an offer which can be accepted by letter is accepted so unconditionally, the contract is completed and becomes binding the instant the letter is posted, even though it should never reach its destination (*Dunlop v. Higgins*, 1 H. L. Ca. 381; *Harvey v. Johnston*, 6 C. B. 304; *Duncan v. Topham*, 8 C. B. 225; *In re Imperial Land Co. of Marseilles*, *Harris' case*, L. R., 7 Ch. 587).

(1) In the case last cited a letter applying for shares in a company was posted and duly received by the directors thereof. A committee in due course was appointed, and allotted to the applicant 100 shares, and the secretary posted a letter addressed to him informing him of the allotment. The letter was received by the applicant, but before he received it, he had sent a letter by post refusing to accept the shares. Held, that the contract was completed the moment the letter announcing the allotment of the shares was put into the post.

(2) The facts in *Dunlop v. Higgins* were shortly these. Dunlop made an offer by post to Higgins, who, according to the usual custom of merchants, was bound to post his answer accepting the offer on a particular day. This he accordingly did. In the ordinary course of post, the letter would have arrived at Glasgow at 8 a.m. the following day but one, but, owing to the slippery state of the road, it failed to do so till 2 p.m. Held, that Dunlop was bound by the

acceptance, notwithstanding that it failed to reach him at the proper time.

(3) In *Duncan v. Topham*, the jury were directed that if a letter accepting the offer made had been lost through the negligence of the post-office, the contract would, nevertheless, be complete; and, on a motion for a new trial, this ruling was upheld.

A distinction seems to have been drawn in *The British American Telegraph Co. v. Colson* (*L. R.*, 6 *Ex.* 108), between the case of a letter being only delayed in the post, and of one wholly lost therein; but this case is disapproved of in *Harris' case*, and can no longer be considered law (see, also, *In re Imperial Land Co. of Marseilles, sup.*; *Wall's case*, *L. R.*, 15 *Eq.* 18).

Acceptance of Offer with Intimation that a Formal Contract is to be subsequently prepared. RULE 51.—An intimation in the written acceptance of a tender that a contract will be afterwards prepared, does not prevent the parties from becoming bound to perform the terms in the tender and acceptance respectively mentioned, if the intention of the parties was thereby to enter into an agreement, and if the preparation of the contract was contemplated merely for the purpose of expressing the agreement already arrived at in more formal language (*Lewis v. Brass*, *L. R.*, 3 *Q. B. D.* 667).

In that case the plaintiff, who had been desirous of making certain alterations in his premises, had invited several builders to state the sum for which they would undertake the work. The defendant sent in a tender which the plaintiff's architect accepted in writing, adding that the contract would be prepared by the plaintiff's solicitors, and would be ready for signature in the course of a few days. The defendant subsequently withdrew his tender, and the plaintiff, being injured thereby, brought his action for breach of contract. It was argued, on behalf of the defendant, that there had never been an unconditional acceptance of the tender, and that there had been an additional term annexed thereto. This contention, however, was overruled, and the defendant was held liable.

"When the existence of a contract is to be gathered from a correspondence," remarked Cotton, L. J., "there must be an unqualified acceptance of the offer, and no term must be introduced. If a new term is introduced there is no contract. It often happens that the language used is ambiguous, and doubts arise whether the parties are *ad idem*. If the plaintiff's architect, by his letter, introduced new terms, the acceptance was not unqualified; but I do not think that he did, and, if it were not for the reference to the preparation of a subsequent contract, it could not have been argued that the contract was incomplete. No new terms as to the execution of the works or payment of the price are mentioned, and, if any other terms were contemplated at the time of the negotiations, it was competent to the

plaintiff not to insist upon them. I think that the rule of construction, laid down in *Crossley v. Maycock* (*L. R.*, 18 *Eq.* 180), is correct, and that the acceptance of an offer accompanied by the expression of a wish for a more formal instrument is sufficient to enable a court of justice to hold that a final agreement has been arrived at. The defendant has relied upon *Rossiter v. Miller* (*L. R.*, 5 *Ch. D.* 648). I do not think that that case is at variance with our decision: there the court held that upon the construction of the documents no final contract had been arrived at; and it is to be observed that by the conditions the purchaser was 'required to sign a contract.' The language used was different from that in the present case, and the decision is no authority against the conclusion to which we have come."

Mutuality of Obligation. RULE 52.—It is, as a general rule, necessary not only that there should be a mutuality of consent, but that there should be a mutuality of obligation; or in other words, that the contract should be as binding upon the one party as upon the other (see *Chitty*, 13).

There are, however, many cases in which one of the contracting parties would be bound to perform what he has undertaken to do, although there is no liability imposed by the contract upon the other; thus,—

1. The plaintiffs advertised for tenders for the supply of stores for twelve months. The defendant

sent in a tender to supply the stores for the period named—"in such quantities as the company's store-keeper might order from time to time," and the plaintiffs accepted his tender. It was held, that there was a binding contract upon the defendant to supply the goods, although the plaintiffs were under no legal liability to order any (*Great Northern R. Co. v. Witham*, *L. R.*, 9 *C. P.* 16).

2. Again, to put a case mentioned by Parke, B., in *Kennaucay v. Treleavan*, 5 *M. & W.* 501: If a person said to another, "In case you choose to employ this man as your agent for a week, I will be responsible for all such sums as he shall receive during that time and neglect to pay over to you;" the person who so undertakes to be responsible is answerable, should there be any default made; but, on the other hand, no action will lie by him against the person indemnified for not taking the man into his service.

3. So, too, as we have seen, a person who has attained his majority is bound by a contract with an infant, though, as a rule, the infant is not (*Holt v. Ward*, 2 *Str.* 973; *ante*, *p.* 14). In like manner, a person who has not signed a contract coming under the Statute of Frauds, cannot be sued thereon; although he may sue the other contracting party who has (*Laythorp v. Bryant*, 3 *Scott*, 238).

CHAPTER II.

THE CONSIDERATION.

RULE 53.—*Ex nudo pacto non actio oritur*; and in order that a promise may become binding as a simple contract it must be supported by a valuable consideration (*Deacon v. Gridley*, 15 C. B. 295; 2 Bl. C. 445; see *McManus v. Bark*, L. R., 5 Ex. 65).

What is a Valuable Consideration.—A valuable consideration may be defined as being any act of the promisee's from which the promisor (or some person at his request) derives a benefit or an advantage; or any labour, trouble, or inconvenience to, or charge upon, the promisee, at the request of the promisor.

The following examples will be useful to show what has, and what has not, been held sufficient to constitute a valuable consideration; so as, on the one hand, to support and render binding a promise, and, on the other, to cause it to fail to have any legal effect as a contract by reason of it being a mere *nudum pactum*.

(1.) A. agreed in writing that, in consideration that B. would appoint him to receive a sum of money for a lace machine (agreed for between B. and C.), he would take the machine and pay the balance

should there be any default on the part of C. C. did make default. Held, that this agreement of A.'s was not binding on him for want of a consideration (*Bates v. Cort*, 3 D. & R. 676; 2 B. & C. 474).

(2.) An agreement whereby a person undertakes, on consideration that his debtor will pay a portion of his debt, to let him off the rest, is void for want of a consideration (*Overton v. Banister*, 3 Hare, 503; *Cumber v. Wane*, 1 Sm. L. Ca. 341); though, if there be some additional advantage to the creditor, as if the full debt was not payable till *three months*, and he agreed to receive a part thereof *at once* in satisfaction of the whole, the case would be different (*Pinnel's case*, 5 Rep. 117).

(3.) **Forbearance to Sue.**—*Forbearance to sue is a sufficient consideration for any promise based thereon* (*Harris v. Venables*, L. R., 7 Ex. 285; *Temple v. Pink*, 1 Ex. 74; *Oldershaw v. King*, 2 H. & N. 517); as, also, is the compromise of a disputed claim made *bona fide*, even although it ultimately appears that the claim was wholly unfounded (*Callisher v. Bischoffsheim*, L. R., 5 Q. B. 449).

In that case the declaration alleged that the plaintiff had stated that certain monies were due to him from the government of H., and was about to take proceedings to enforce payment; and, thereupon, in consideration that the plaintiff would forbear taking such proceedings for an agreed time, the defendant promised to deliver to the plaintiff certain debentures. Breach, that the defendant did not deliver the debentures. Plea, that at the time

of making the agreement no money was due to the plaintiff from the government of H. Held, on demurrer, that the plea was no answer to the declaration.

(4.) **Confidence.**—*Where a person undertakes, without consideration, to do a certain act for another, though no action will lie against him for not doing the same, yet, if he once enters upon his undertaking, the trust or confidence reposed in him will be a sufficient consideration to oblige him to perform it properly.*

Accordingly, where A. agreed, without any consideration for his promise, to take up several hogsheads of brandy belonging to B., then in a certain cellar, and to carry them to another and there to store them, and he and his servants so negligently put them down that one of the casks was staved and a great quantity of brandy lost, it was held that an action of assumpsit would lie against A. (*Coggs v. Bernard*, 1 Sm. L. Ca. 188).

"It is objected," said Holt, C. J., "that there is no consideration to ground this promise upon, and, therefore, the undertaking is but a *nudum pactum*. But to this I answer that the owner's trusting him with the goods is a sufficient consideration to oblige him to a careful management. Indeed, if the agreement had been executory to carry these brandies from one place to another on such a day, the defendant had not been bound to carry them. But this is a different case, for *assumpsit* does not only signify a future agreement, but, in such a case as this, it signifies an actual entry upon the thing and taking

the trust upon himself; and if a man will do that, and miscarries in the performance of his trust, an action would lie against him for that, though nobody could have compelled him to do the thing."

(5.) Assignment of a Chose in Action.—

The assignment of a debt, or other chose in action, is a valuable consideration, and will support a promise made by the assignee to the assignor (Mousdale v. Birchall, 2 Bl. R. 820). As to how a chose in action may be assigned, see the Judicature Act of 1873, s. 25 (6).

The plaintiff agreed with C. for the purchase of certain houses. The defendant agreed to give the plaintiff 40*l.* for his bargain; the houses were afterwards, at the plaintiff's request, conveyed to a nominee of the defendant. Held, that the transfer of the bargain was a sufficient consideration for the promise of the defendant (*Price v. Seaman*, 4 B. & C. 528).

(6.) Natural Love and Affection and Moral Consideration.—*It is now clearly settled that a consideration consisting only of natural love and affection, or of a promise to do something that the promisor is only morally bound to do, is not sufficient (Beaumont v. Reeve, 8 Q. B. 485; Jennings v. Brown, 9 M. & W. 496; Tweddle v. Atkinson, 30 L. J., Q. B. 265).*

In *Beaumont v. Reeve*, the defendant, who had lived with the plaintiff and had seduced her, and thereby injured her character, so that it was impossible for her to earn an honest livelihood, undertook to pay her a yearly sum towards her maintenance.

On his failing to do so, and an action being brought against him, he was held not liable, as the *past* seduction, however much in a moral point of view it imposed upon the defendant a duty to provide for the plaintiff, was no legal consideration for his promise.

Bills of Exchange. Sub-rule.—*In bills of exchange and other negotiable instruments the law always presumes a consideration (Philliskirk v. Pluckwell, 2 M. & S. 398); nor can the defendant call upon the plaintiff to prove that he gave any, unless he can show a primâ facie case of the bill being lost, stolen, or tainted with fraud or other illegality (Bailey v. Bidwell, 13 M. & W. 76; Harvey v. Towers, 6 Ex. 656; Berry v. Alderman, 14 C. B. 95).*

Adequacy of Consideration. RULE 54.—The consideration which is to support the promise must (as has been stated) be of some value, but, unless the case savours of fraud, &c., the courts will not enter into its adequacy.

Thus, in *Wilkinson v. Oliveira* (1 Bing. N. C. 490), the defendant had promised to give 1,000*l.* to the plaintiff in consideration of his giving him a certain letter, by means of which he had been able to close sundry disputes between himself and some third parties. Held, that there was a good consideration for the defendant's promise, and that he was bound thereby.

For an example of a consideration being of such

little value as to be colourable, see *Hitchcock v. Coker* (6 A. & E. 438).

Privity. RULE 55.—In order that a plaintiff may succeed in an action on a simple contract, it is necessary that the consideration on which he relies should have proceeded from him, or from some third person “moved or affected” by him; otherwise, however nearly he may be connected to the person from whom it does proceed, there is no *privity*, or “connection or bond of union” (*per Wilde, C. J., Blandy v. De Burgh*, 6 C. B. 634) between himself and the defendant, and *quà* that particular transaction they are strangers one to another (*Tweddle v. Atkinson, sup.*).

(1.) The facts in the last-cited case were as follows: The father of a young lady who was about to be married undertook to pay 200*l.* to his future son-in-law, if the father of the latter would also undertake to give 100*l.* This agreement was accordingly entered into. On an action being brought by the son-in-law against his father-in-law, it was held not to be maintainable, on the ground that the consideration for his promise did not move from the plaintiff.

(2.) The defendant was an office-keeper of the Exeter and London coach and servant to B., a proprietor at Exeter, where the office kept by the defendant was. The defendant from time to time

made up the accounts of the profits due to the several proprietors, and sent the same to the parties concerned, taking the money from the balance of B.'s, which he had in hand. On one occasion the defendant sent to the plaintiff, a proprietor, a packet purporting to contain 23*l.* then due to him, but in reality containing 20*l.* The plaintiff sued the defendant for monies had and received to his use. Held, that he was not liable, there being no privity of contract between himself and the plaintiff (*Howell v. Batt*, 5 B. & Ad. 504).

(3.) A., being defendant in an action brought by B., paid the debt and costs to his own country attorney for transmission to B. The attorney sent a cheque exceeding the amount to his own town agent, directing him to pay the costs and debt out of it. The agent acknowledged the receipt by letter to the country attorney, and therein promised to apply the money as directed, but he retained it in reduction of a debt due to him from the attorney. Held, that there was no sufficient privity to support an action for money had and received by A. against the agent (*Cobb v. Becke*, 6 Q. B. 930; 9 Jur. 439; 14 L. J., Q. B. 108).

(4.) The acceptor of a bill paid a sum of money into the bank to be appropriated to the payment thereof. The money was duly received and entered in the books. The drawers, owing to the bank not having taken up the bill, were obliged to pay it. Held, on action being brought by the drawer against the banker, that there was no privity between them,

the contract to pay being only between the acceptor and the banker (*Moore v. Bushell*, 27 L. J., Ex. 3; see *Hill v. Royds*, L. R., 8 Eq. 290).

Kinds of Consideration.—Consideration, in regard to time, may be either executed, executory, contemporaneous, or continuing.

(1.) An executed consideration is one that is altogether passed.

(2.) An executory consideration is one that has yet to be performed.

(3.) A contemporaneous, or, as it is sometimes called, a concurrent consideration, is defined by Mr. Smith, in his Manual of Common Law, as “one which is contemporaneous with a promise made in consequence of it, or one which arises where two persons simultaneously and reciprocally promise to do certain things, the promise of the one party being the consideration for the promise of the other.

(4.) And, lastly, a continuing consideration is one which is partly past and executed, but is still continuing at the time of the promise.

Request. RULE 56.—The consideration must be moved by a previous request, express or implied, proceeding from the promisor to the promisee (*Lampleigh v. Braithwaite*, 1 Sm. L. Ca. 141). In the case of executory, concurrent, and continuing considerations the request is always implied, and need not be proved or declared; but

where the consideration is executed, it must be express, except in the cases hereinafter mentioned.

(1.) The defendant's testator wrote to his nephew, "I am glad to hear of your intended marriage with E. N., and, as I promised to help you at starting, I am happy to tell you that I will pay you 150*l.* at starting, during my life, and until your annual income, from your profession of a chancery barrister, shall amount to 600 guineas." The plaintiff married E. N., and on the uncle's death, there being certain arrears of the annuity due, he sued the executors. Held, that the above letter amounted to a request to the plaintiff to marry E. N., and that consequently the promise was binding (*Shadwell v. Shadwell*, 9 C. B., N. S. 159; 30 L. J., C. P. 97).

(2.) In *Tipper v. Bicknell* (3 Bing. N. C. 710), the declaration stated that the defendants, being in possession of certain mortgage deeds, of which H. R. was desirous to obtain an assignment by the payment of 500*l.*, the plaintiff consented, at H. R.'s request, to accept bills to that amount (drawn by H. R.), upon H. R. promising that the defendants would deliver the mortgage deeds to the plaintiff as a security: that the defendants, in consideration of the plaintiff accepting the bills, undertook to deliver the deeds to him upon his paying them the amount of the bills. Held, that the declaration disclosed a good cause of action.

(3.) In *Massey v. Goodall* (17 Q. B. 310), the declaration alleged that the defendant had become and was tenant from year to year to the plaintiff, on cer-

tain stipulations, and that in consideration thereof the defendant then promised the plaintiff that he would pay the plaintiff all such penalties, &c. Breach, nonpayment. Held, that the declaration disclosed a good cause of action.

"It is *not alleged*," remarks Patteson, J., "that he (the defendant) became and was tenant *at his request*; but I take it that it is only necessary to lay a request, where the consideration was wholly bygone and executed at the time of the promise, and that it is not necessary, when it is a continuing consideration, as this is, where the terms would continue, after the promise, throughout the whole tenancy."

(4.) B.'s servant was arrested, and H. of his own accord stood bail for him, and procured him his release: in consideration of which B. afterwards promised H. to save him harmless. H., having been compelled to pay the servant's debt, brought an action against the master to recover the amount. Held, that "as the master did never make request to the plaintiff to do so much, but he did it of his own head," the action would not lie (*Hunt v. Bate, Dyer, 272*).

When a Request is Implied in Executed Consideration. Sub-rule.—*In the following cases, a previous request is implied, notwithstanding the fact that the consideration is past and executed.*

1. *When the consideration consists in the plaintiff having been compelled to do that which the defendant was legally compellable to do.*

Thus, if A. becomes surety for B. at his request, and is subsequently compelled to pay his (B.'s) debt

to C., A. may recover from B., without proving that he paid C. at B.'s request. The request to pay the money is implied by law from the fact of entering into the engagement (*Batard v. Hawes*, 2 E. & B. 296).

2. *When the consideration is beneficial to the defendant, and has been actually adopted and enjoyed by him* (*Story on Con. i. 553*).

This may be illustrated by an example given by Rolfe, B., in *Bird v. Brown* (4 Exch. 798). If A., unauthorized by B., makes a contract on his behalf with C., and B. afterwards recognizes and adopts it, he may be sued thereon by C.; and the fact that the previous request by B. was not expressed is immaterial.

3. *Where the consideration is of such a nature that it must have been moved by a previous request of the defendant, as in the case of money lent* (*Smith, L. Ca. 147*).

In each of these cases, as will be seen hereafter, the promise to indemnify is implied as well as the request.

4. *When the consideration consists in the plaintiff having voluntarily done that which the defendant was legally compellable to do, and the defendant has afterwards expressly promised to indemnify him.*

As if A. owed a debt to B., and C. paid it for him, and A. subsequently promised to repay C. the sum so expended (*Wing v. Mill*, 1 B. & Ald. 104; *Paynter v. Williams*, 1 C. & M. 818).

It is now clearly settled that a previous request will not be implied where the plaintiff has voluntarily done that which the defendant was only morally compelled to do; not even though the defendant in con-

sideration thereof has expressly promised to reimburse the plaintiff (*Eastwood v. Kenyon*, 11 *Ad. & E.* 438; *Beaumont v. Reeve*, *sup.*).

Impossible Considerations. RULE 57.—

In order to found a consideration for a promise, it is necessary that it should be capable of being performed both in fact and in law; and the same rule applies when part of the consideration is capable of performance, but it is impossible, either in fact or in law, for the contractee to perform it to its fullest extent (*Nerot v. Wallace*, 3 *T. R.* 17, 23).

(1.) In that case the facts were as follows:—A friend of a bankrupt promised to pay to his assignees all such sums as he, the bankrupt, was charged with having received, but not accounted for, in consideration that the assignees, on their part, would undertake to forbear to examine him, and that the commissioners would desist from doing so.

In his judgment in this case, Lord Kenyon remarked, “I do not say that this is a *nudum pactum*, but the ground on which I found my judgment is that every person who, in consideration of some advantage, either to himself or another, promises a benefit, *must have the power of conferring* that benefit *up to the extent* to which that benefit professes to go, and that, not only in fact, but in law. Now the promise made by the assignees, which was the consideration of the defendant’s promise, was not in their power to perform, because the commissioners had,

nevertheless, a right to examine the bankrupt, and no collusion of the assignees could deprive the creditors of the right of examination which the commissioners would procure them."

(2.) So, also, where the consideration is in itself, and not in law, impossible, as should A. promise to go from Westminster to Rome in an hour, or to make water flow up hill, &c. (see *Chitty*, 45).

Sub-rule.—*Where, however, the consideration is only difficult, or it is only improbable that it can be performed, or it is "in respect to the defendant's ability," and not because the thing to be done is in itself naturally or legally impossible, that the impossibility arises, the consideration, as a general rule, will be valid and binding (Thornborow v. Whitacre, 2 Ld. Raym. 1164; see Chitty, 46).*

It is on this ground that the owner of a ship, who had agreed to load her with a certain cargo in a given time, and was prevented from so doing by a severe frost, was held liable; he having himself to blame for not having guarded against such a contingency by inserting a provision in his contract (*Kearon v. Pearson*, 7 H. & N. 386).

See further on this sub-rule, *This v. Byers* (L. R., 1 Q. B. D. 244); *Thorn v. Mayor of London* (L. R., 1 H. L. Ap. Ca. 120); *Paradine v. Jane* (Aley, 26).

Exception to Sub-rule.—To this sub-rule there are various exceptions, as where the consideration consists in a promise to do something for which the personal skill or labour of the contractee is required, and, owing to the act of God, he is rendered incapable

of doing the same (*Robinson v. Davison*, *L. R.*, 6 *Ex.* 219; *Farrow v. Wilson*, *L. R.*, 4 *C. P.* 744; *Boast v. Firth*, *L. R.*, 4 *C. P.* 1); or, again, "where from the nature of the contract it appears that the parties must from the beginning have known that it could not be fulfilled, unless, when the time for the fulfilment of the contract arrived, some specified thing continued to exist, so that when entering into the contract they must have contemplated such continued existence as the foundation of what was to be done; then, in the absence of any express or implied warranty that the thing shall exist, the contract is not to be construed a positive contract, but subject to the implied condition that the parties shall be excused in case before breach performance becomes impossible, from the perishing of the thing, without default of the contractee" (*Taylor v. Caldwell*, 3 *B. & S.* 826). See further, Chapter on Discharge of Obligation.

As an example of this latter exception, the following affords a good illustration:—

The defendant in March, 1872, agreed to sell to the plaintiff 200 tons of regent potatoes, grown on land belonging to the defendant, at a certain price, to be delivered in September and October, 1872. The defendant, at the time of the contract, had sixty-eight acres ready for planting potatoes, part of which was already sown, and the rest was sown afterwards. This quantity of land was enough in ordinary years to produce more than 200 tons. From no fault of the defendant, but in consequence of a potatoe-blight which occurred in August, the crop failed, and the defendant was able to deliver only eighty tons:—

Held, in an action for non-delivery of the remainder, that, the contract being for the sale of part of a specific crop, the case was within the principle of *Taylor v. Caldwell* (32 *L. J.*, *Q. B.* 164; 3 *B. & Sm.* 826); and that the delivery of the potatoes being prevented by *vis major*, the defendant was excused from the performance of the contract (*Howell v. Coupland*, *L. R.*, 9 *Q. B.* 62, aff. in 1 *C. A.*, 1 *Q. B. D.* 263; see *Clifford v. Watts*, *L. R.*, 5 *C. P.* 577; *Appleby v. Meyers*, *L. R.*, 2 *C. P.* 651).

Illegal Considerations. RULE 58.—The consideration must be lawful, for otherwise, though the illegality thereof be partial only, the contract is rendered void (*Waite v. Jones*, 1 *Scott*, 730).

The subject of illegal consideration will be found fully discussed in a subsequent chapter.

Money paid on a Consideration that has Failed. RULE 59.—Where money has been paid on a consideration that has wholly, and not merely partially, failed, it may be recovered back (*Hunt v. Silk*, 5 *East*, 449).

Accordingly, a person may recover money given for a forged bill or bank note (*Jones v. Ryde*, 5 *Taunt.* 488); or for shares in a company that has never been formed (*Moore v. Garwood*, 4 *Ex.* 681); or paid as deposit on a contract for the sale of goods or lands that cannot be completed by the vendor (*Blackburn v. Smith*, 2 *Ex.* 783). As has been

pointed out in the rule, it is absolutely necessary that there should have been a *complete* failure of the consideration, or should it consist of distinct and severable parts, then, a complete failure of one or more of such parts; because, as long as the plaintiff has obtained that for which he bargained, it is immaterial—so far as an action for money had and received goes—whether it is of the value or description he contracted for, or not (*Lambert v. Heath*, 15 *M. & W.* 486).

CHAPTER III.

THE PROMISE.

THE Promise, the remaining part of the contract we have to consider, may be express or implied.

Express Promises. RULE 60.—The promise, like the consideration, must be legal. Where, however, there are several promises, founded upon the same lawful consideration, some of which are legal and others illegal, the contract is only void in respect of the latter, and the former will remain binding, unless, from the peculiarity of the contract, the parts thereof cannot be separated (*Price v. Green*, 16 *M. & W.* 346; *MacAllen v. Churchill*, 11 *Moore*, 483; see “Illegal Contracts”).

Implied Promises. RULE 61.—“Where a relation exists between two parties, which involves the performance of certain duties by one of them, and the payment of reward to him by the other, the law will imply, or the jury may infer, a promise by each party to do what is to be done by him” (*Morgan v.*

Ravey, 6 H. & N. 276; *Streeter v. Horlock*, 1 Bing. 34; *Dugdale v. Lovering*, L. R., 10 C. P. 196).

(1) A banker impliedly undertakes with his customer that he will pay the cheques drawn by him, provided he has money in hand belonging to that customer, and the cheque is presented for payment during proper hours (*Marzetti v. Williams*, 1 B. & Ald. 424).

(2) A lessor impliedly promises to make out a good title to the lease he is about to assign or grant; and, unless he is able to do so, he cannot maintain an action at law against the buyer for refusing to accept the purchase, but is, on the contrary, liable to be sued himself for breach of contract (*Souter v. Drake*, 5 B. & Ad. 992; *Stranks v. St. John*, L. R., 2 C. P. 376).

(3) In *Redhead v. Midland R. Co.* (L. R., 2 Q. B. 412; 4 Q. B. 379), citing *Brown v. Edgington* (2 M. & G. 279), Mr. Justice Blackburn remarked, "Where one party to a contract engages to select and supply an article for a particular purpose, and the other party has nothing to do with the selection, but relies entirely upon the party who supplies it, it is to be taken as a part of the contract implied by law, that the supplier warrants the reasonable sufficiency of the article for that purpose."

(4) A person who lets a *furnished* house is, in law, under an implied undertaking that it shall be fit for habitation at the time agreed upon for the tenancy to commence; and, unless it is so, the lessee may

rescind the contract (*Smith v. Marrable*, 11 *M. & W.* 5; *Wilson v. Hatton*, *L. R.*, 2 *Ex. D.* 336).

(5) Medical men, solicitors, surveyors, &c., impliedly undertake to use reasonable skill and care in the performance of their professional services (*Broom*, *p.* 660).

Executed Considerations and Implied Promises. RULE 62.—Where the consideration is executed, and has been moved by a previous request, express or implied, the law will, as a general rule, presume a promise by the contractor (see *Broom*, 326; *Fish v. Kelly*, 17 *C. B.*, *N. S.* 194).

(1) If a person has been compelled to do that which another was legally compellable to do, the law will not only imply a previous request (as we have seen, *p.* 92), but it will presume a promise on the part of the latter person to indemnify the former.

(2) And, again, where the defendant has adopted and enjoyed the benefit of the consideration—as where goods are sent to him under circumstances that clearly show that a sale, and not a gift, was intended—and he keeps and consumes, or uses the same, he will be liable to pay for them (see on this subject *Melhado v. Porto Alegre R. Co.*, *L. R.*, 9 *C. P.* 503; *Phosphate of Lime Co. v. Green*, *L. R.*, 7 *C. P.* 43).

(3) If a person has paid money for another, at his request or authority, there is an implied promise raised in law that the latter will repay him (*Brittain v. Lloyd*, 14 *M. & W.* 762).

Exception.—In the following cases, though the consideration is executed, and though it was duly moved by a previous request, the law will not imply a promise.

(1) Where a barrister has performed professional services for his client, there is no implied undertaking on the client's part to remunerate him (*Kennedy v. Brown, infra*).

"The relation of counsel and client in litigation," it was said in that case, "creates the incapacity to make a contract of hiring as an advocate. It follows that the request and promise of the defendant (the client) and the services of the plaintiff (the barrister) create neither an obligation, nor an inception of an obligation, nor any inchoate right whatever capable of being completed and made into a contract by any subsequent promise" (*per Erle, C. J.*, in *Kennedy v. Brown*, 13 C. B., N. S. 677; see also *Mostyn v. Mostyn, L. R.*, 5 Ch. 457).

By this it will be seen that a barrister is unable to recover his fees, even where there is an express promise made to him.

(2) At common law, physicians were also incompetent to sue for fees due to them, unless they had expressly stipulated that they were to receive remuneration for the services performed by them (*Veitch v. Russell*, 3 Q. B. 928; *Leman v. Fletcher, L. R.*, 8 Q. B. 319). By 21 & 22 Vict. c. 90, s. 31, it is enacted, that physicians, properly registered, may recover reasonable remuneration for their professional services, provided they are not restricted from so doing by any bye-law of the college whereof they

are members. Such a bye-law exists in the College of Physicians (see *Sm. L. Ca.* 151).

(3) An infant to whom goods, other than necessities, have been supplied, is, as we have seen, under no legal liability to pay for them. Nor, at common law, is a married woman under any obligation to pay for articles sold, whether they be necessities or not.

(4) Where a person has *voluntarily* done that which another was legally compellable to do, the law implies no promise to indemnify.

Executed Considerations and Express Promises. RULE 63.—A consideration past and executed will support no other promise than such as would be implied by law (*per* Denman, C. J., in *Roscorla v. Thomas*, 3 Q. B. 234).

(1) So, in that case, it was held that no action would lie against the defendant, a horse-dealer, for breach of warranty in warranting a horse sound and free from vice, when the sole consideration for the warranty was that the plaintiff *had*, at the request of the defendant, bought a horse. The only promise which the law would imply from such a consideration would be the delivery of the horse upon request.

(2) Again, upon an account stated the law implies a promise, on behalf of the debtor, to pay the sum found to be due *on request*; consequently, a promise to pay the same on some future day would need a fresh consideration (*Hopkins v. Logan*, 5 M. & W. 241).

*Exception. Sub-rule.—Where the consideration was originally beneficial to the party promising, yet, if he be protected from liability by some provision of the statute or common law, meant for his advantage, as in the case of a debt due by him being barred by the Statute of Limitation, he may renounce the benefit of that law; and, if he promises to pay the debt, which is only what an honest man ought to do, he is then bound by the law to perform it . . . and debts so barred are unquestionably a sufficient consideration for every promise, whether absolute or unqualified, qualified or conditional, to pay them. Promises to pay such a debt simply, or by instalments, or when the party is able, are all equally supported by the past consideration. But it does not follow that, though a promise revives the debt in such a case, any of those debts will be a consideration to support a promise to do a collateral thing, as to supply goods, or to perform labour (per Parke, B., in *Reeves v. Hearne*, 1 M. & W. 323; *Earle v. Oliver*, 2 Ex. 90).*

CHAPTER IV.

ILLEGAL CONTRACTS GENERALLY, AND CONTRACTS
ILLEGAL AT COMMON LAW.

IN the present and following chapter, where I propose considering the subject of illegal contracts, it must be understood as being immaterial whether the illegality exists in the consideration or the promise. But for the exception hereinbefore stated (*pp.* 96, 98), the effect of illegality in the one is the same as that in the other.

Illegal Contracts generally. **RULE 64.**—Where the contract, which the plaintiff is desirous of enforcing, be it express or implied, is expressly or impliedly forbidden by law, no court will lend him its assistance to give it effect (*Cope v. Rowland*, 2 *M. & W.* 149). *Ex turpi causa non oritur actio.*

“You shall not stipulate for iniquity,” observed Wilmot, C. J., in *Collins v. Blantern* (1 *Sm. L. Ca.* 381). “All writers upon our law agree in this, no polluted hand shall touch the pure fountains of justice.”

Contracts connected with Illegal Transactions. Sub-rule.—*The test whether a demand, connected with an illegal transaction, is capable of being enforced at law, is whether the plaintiff requires any aid from the illegal transaction to establish his case.*

A. bet an illegal wager of twenty-five guineas with B. on a horse race, of which C. agreed to contribute ten. A. won and paid C., in the expectation of receiving the whole of the amount from B. B. died, and A. never received it. Held, that A. was not entitled to recover the ten guineas from C. which he had paid him, because he could not substantiate his case without going into the illegal transaction, in which both were equally involved (*Simpson v. Bloss*, 2 *Marsh*, 542; 7 *Taunt.* 246).

Money paid on Illegal Contracts. RULE 65.—Where the contract is executory, and money has been paid under it by the one party to the other, there is a *locus pœnitentiæ*, and the party paying may recover it back; but when once the contract is executed the *locus pœnitentiæ* is gone, and, if the parties are *in pari delicto*, the money so paid cannot be recovered (*Busk v. Walsh*, 4 *Taunt.* 290; *Goodhall v. Lounder*, 6 *Q. B.* 464; see *Chitty*, 591).

Presumption as to Illegality. RULE 66.—Where a contract is reasonably capable of being construed in two ways, one of which would make it legal and the other illegal,

the presumption in law being against illegality, the former construction is preferred (*Lewis v. Davison*, 4 M. & W. 654).

Contracts are illegal either because they are made so by common law or because they are prohibited by statute. Those that are unlawful at common law may be subdivided into—

I.—THOSE THAT CONTRAVENE PUBLIC POLICY
AND ARE INJURIOUS TO THE STATE.

II.—THOSE THAT TEND TO VIOLATE MORALITY.

I.—*Contracts Void on the Ground of Public Policy.*

The question whether a contract is void on this ground is for the court, when the circumstances raising the question are conceded (*Tallis v. Tallis*, 1 Ell. & Bl. 391).

(a.) **Contracts in restraint of Trade.**

RULE 67.—All contracts which have for their object a general restraint of trade are absolutely void; but those which would operate as a partial restraint only are valid provided such restraint is fair and reasonable, and, of course, made upon a valuable consideration (*Mitchel v. Reynolds*, 1 Sm. L. Ca. 406; *Mallan v. May*, 11 M. & W. 653).

In all restraints of trade, where nothing more appears, the law presumes them bad; but if the

circumstances are set forth that presumption is excluded, and the court is to judge of those circumstances and determine accordingly; and if upon them it appears to be a just and honest contract, it ought to be maintained (*per Parkes*, ¹C. J., *Mitchel v. Reynolds*, *sup.*).

Partial Restraint. Sub-rule.—*A restraint may be partial either in respect of time or of space. If the space is unlimited the contract will be void, even though the time is limited (see Ward v. Byrne, 5 M. & W. 548); but, provided the space is limited, the contract may be valid, notwithstanding the fact that the time is unlimited (Catt v. Tourle, L. R., 4 Ch. 659).*

Reasonable Restraint.—"We do not see how a better test can be applied to the question, whether reasonable or not, than by considering whether the restraint is such only as to afford a fair protection to the interest of the party in favour of whom it is given, and not so large as to interfere with the interest of the public. Whatever restraint is larger than the necessary protection of the party can be of no benefit to either; it can only be oppressive, and, if oppressive, it is in the eye of the law unreasonable (*per Tindal*, C. J., in *Horner v. Graves*, 7 Bing. 744).

Examples of Rule.—(1) In the case last cited an agreement by which a surgeon dentist undertook that he would not practise within 100 miles of York, was held void, the distance of 100 miles being considered unreasonable.

(2) In *Mallan v. May* (*sup.*), the defendant, in consideration that the plaintiff would instruct him in the business of a surgeon dentist, agreed, after the expiration of his term, not to carry on the business in London, or in any of the towns or places in England or Scotland where the plaintiff might have been practising before the expiration of the said service. Held, first, that the agreement not to practise in London was valid, the limit thereof not being too large for the profession in question; secondly, that the stipulation not to practise in the towns where the plaintiff might have been practising during the service was an unreasonable restriction, and, therefore, illegal and void; and, thirdly, that the stipulation as to not practising in London was not affected by the illegality of the other agreement. It would seem that the populousness of the district cannot be taken into consideration, when deciding as to the reasonableness or unreasonableness of the restriction (Parke, B., *per*).

(3) In *Proctor v. Sargent* (2 *Scott, N. R.* 289), a contract by a milkman not to carry on his trade within five miles of Northampton Square, Middlesex, was held valid. So, also, in *Bunn v. Guy* (4 *East*, 190), an agreement by an attorney not to practise in London and 150 miles round; and, in *Harms v. Parsons* (32 *Beav.* 328), a covenant not to carry on the trade of a horsehair manufacturer within 200 miles of Birmingham.

(4) Upon the formation of a company for the purchase and working of a certain process of manufacture introduced into this country from America,

the agreement for the purchase contained a provision that the vendors would "not directly or indirectly carry on, nor will they, to the best of their power, allow to be carried on by others, in any part of Europe any company or manufactory having for its object the manufacture or sale of productions now manufactured in the business or manufactory" (of the vendors), "and will not communicate to any person or persons the means or processes of such manufacture, so as in any way to interfere with the exclusive enjoyment by the purchasing company of the benefits hereby agreed to be purchased." Held, that the restriction contained in this clause was not greater, having regard to the subject-matter of the contract, than was necessary for the protection of purchasers, and was capable of being enforced against the vendors (*Leather Cloth Co. v. Lorsche, L. R., 9 Eq. 345*).

"All the cases," said Sir William James, V.-C., "when they come to be examined, seem to establish this principle, that all restraints upon trade are bad, as being in violation of public policy, unless they are natural and not unreasonable for the protection of the parties in dealing legally with some subject-matter of the contract. The principle is this: public policy requires that every man should be at liberty to work for himself, and should not be at liberty to deprive himself or the state of his labour, skill, or talent by any contract that he enters into. On the other hand, public policy requires that when a man has by skill, or by any other means, obtained something which he wants to sell, he should be at liberty

to sell it in the most advantageous way in the market, and, in order to enable him to sell it advantageously in the market, it is necessary that he should be able to preclude himself from entering into competition with the purchaser. In such a case the same public policy that enables him to do that, does not restrain him from alienating that which he wants to alienate, and, therefore, enables him to enter into any stipulation, however restrictive it is, provided that restriction, in the judgment of the court, is not unreasonable, having regard to the subject-matter of the contract."

(5) In *Allsop v. Wheatcroft* (*L. R.*, 15 *Eq.* 59), a clerk and traveller to a firm of brewers agreed not to directly or indirectly sell, procure orders for, or recommend, either on his own account or for any other person, during his service, or within two years afterwards, any Burton ale or porter brewed at Burton, or offer for sale as such, other than the ale, beer or porter brewed by the plaintiffs. Held, that the agreement was void, the above restrictions being unnecessarily extensive.

See further on this subject *Carter v. Williams* (*L. R.*, 9 *Eq.* 678); *Catt v. Tourle* (*L. R.*, 4 *Ch.* 654); *Josselyn v. Parson* (*L. R.*, 7 *Ex.* 127).

(b.) **Restraint on Marriage.** RULE 68.—Contracts which tend to operate as a *general* restraint upon marriage are illegal and void (*Lowe v. Peers*, 4 *Burr.* 2225).

(1) In that case the defendant had executed a deed which contained the following undertaking: "I do

hereby promise Mrs. L. that I will not marry with anybody besides herself; if I do, I agree to pay to the said C. L. 100*l.* within three months after I shall marry anybody else." Held, that the contract, not being a contract to marry the plaintiff, but "not to marry anybody else," was illegal, as the plaintiff was under no obligation to marry the defendant, and, should she refuse to do so, the restriction would bar the man from marrying at all.

(2) A., being a widow, gave B. a bond by which she undertook to pay him 100*l.* if she should marry again; and he gave her a bond to pay her executors a like sum if she should not marry again. The bond was ordered to be delivered up and cancelled, as being in restraint of marriage (*Baker v. White*, 2 *Vern.* 215).

NOTE.—In these cases (and in a few others which I have had to cite) the contract was by deed, but the principle, it must be understood, is equally applicable to simple contracts.

(c.) **Marriage Brocage.** RULE 69.—Every contract for procuring a marriage for reward is illegal (see *Leake on Con.* 758).

A. undertook by deed to pay B. 500*l.* within a certain time after he should be married to a certain lady, if B. would undertake to bring about and procure such a marriage. The bond was ordered to be cancelled (*Hall v. Potter*, 3 *Lev.* 411).

(d.) **Contracts for Future Separation of Husband and Wife.** RULE 70.—All contracts made in contemplation of, and pro-

viding for, the future separation of husband and wife, are illegal; but contracts made in contemplation of, and providing for, their immediate separation, are valid (*Hindley v. Marquis of Westmeath*, 6 B. & C. 200; *Jones v. Waite*, 9 Cl. & F. 101).

In order that such a contract may be binding on the husband, it is necessary that some third party should contract on behalf of the wife,—a husband and wife being unable in law to enter into a binding agreement one with another. For this purpose, in an ordinary separation deed, trustees are interposed, with whom the husband covenants to pay his wife a suitable allowance, and they, on their part, to indemnify him against her debts, &c. (As to the effect in Equity of not interposing trustees, see *Poll. on Con.* 62).

(e.) Contracts impeding Administration of Justice. RULE 71.—All contracts which would impede, or obstruct, the due administration of public justice are illegal.

Compounding Felonies and Public Misdemeanours. Sub-rule.—*The law will permit a compromise of any offence, though made the subject of a criminal prosecution, for which the injured party might recover damages in an action; but if the offence is of a public nature, no agreement can be valid which is made for the purpose of stifling its prosecution* (*Keir v. Leeman*, 6 Q. B. 308; 9 Q. B. 371).

(1) So, in that case, it was held a person might

lawfully agree to compromise an indictment for a common assault upon himself; but, on the other hand, not where the agreement was to withdraw a prosecution for an assault accompanied with riot.

(2) A promissory note, given in consideration of the payee forbearing to prosecute a charge of obtaining money under false pretences against the maker, is illegal and void (*Clubb v. Hutson*, 18 C. P., N. S. 414).

(3) Again, where a petition had been lodged in the House of Commons against the return of a member, on the ground of bribery, and the petitioner agreed to withdraw the said petition on payment of a certain sum, the contract was held to be illegal (*Coppock v. Bower*, 4 M. & W. 361).

(4) For the same reason an agreement to withdraw a prosecution for perjury, and not to give evidence against the prisoner, is invalid (*Collins v. Blantern*, 1 Sm. L. Ca. 369; see *Elliott v. Richardson*, L. R., 5 C. P. 744; *M'Kewan v. Sanderson*, L. R., 20 Eq. 65).

Maintenance and Champerty. Sub-rule 2. —A contract, whereby one person agrees to help or maintain another, either by money or otherwise, in the conduct of any legal proceeding in which he (the former) has no legal interest, nor reasonable grounds on which to suppose he has an interest (*Findon v. Parker*, 11 M. & W. 675), is illegal, and amounts to maintenance (*Radcliffe v. Anderson*, E. B. & E. 819; *Earle v. Hopwood*, 9 C. B., N. S. 566). Such an agreement, when made upon the consideration that the person assisting the plaintiff should

share in the proceeds of the action, is champerty, and is also unlawful (Hutley v. Hutley, L. R., 8 Q. B. 112; Sprye v. Porter, 7 E. & B. 58).

(1) A contract, whereby an attorney stipulates with a client to receive, in consideration of the large advances requisite to the conducting the proceedings to a successful issue; over and above his legal costs and charges, a sum which should be commensurate with his outlay and exertions, and with the benefit resulting to the client, is void on the ground of maintenance (*Earle v. Hopwood, sup.*).

(2) An attorney undertook to commence and carry on an action for the recovery of a certain sum, on consideration of his receiving one-half of the proceeds of the action should he be successful. On the other hand, it was arranged, in the event of the proceedings terminating adversely, he was not to charge the plaintiff anything for costs. Held, that such a contract amounted to maintenance and was void (*In re Masters, 4 Dowl. 18; see also 33 & 34 Vict. c. 28, s. 11*).

(3) An assignment, however, of the subject-matter of a suit, by way of security for costs only, is not champerty (*Anderson v. Ratcliffe, E. B. & E. 806*).

(4) In *Hutley v. Hutley (L. R., 8 Q. B. 112)*, the declaration alleged that J. H., a brother of the defendant, and a cousin of the plaintiff, had died, leaving large real and personal property; that the defendant was heir-at-law of J. H., and one of his next-of-kin; that J. H. left a will, whereby his real and personal property was left to persons other than the plaintiff and the defendant, and that the plaintiff believed that the

will revoked a former will by which J. H. had bequeathed property to the plaintiff; and that in consideration that the plaintiff would take necessary steps to contest the will and advance money, and obtain evidence for such purpose, and instruct an attorney, the defendant promised to share with the plaintiff half the real and personal property which might come to the defendant by reason of such proceedings. Held, that the agreement amounted to champerty; and that the fact that the plaintiff was a relation of the defendant, and had some collateral interest in the suit, did not prevent a contract, by which he was to receive half of what the defendant recovered, being champerty (see *De Hoghton v. Money*, *L. R.*, 2 *Ch.* 169; *Dickenson v. Burrell*, *L. R.*, 1 *Eq.* 337; *Hilton v. Woods*, *L. R.*, 4 *Eq.* 432).

Other contracts might be mentioned, such as those tending to prejudice the revenue, or to bring about a breach of the peace, or to indemnify a person against the doing of, or for the having done, an illegal act, such as publishing a libel (*Shackell v. Rosier*, 2 *N. C.* 634), that are rendered unlawful by the common law, as being against public policy. In a word, "Wherever the tolerating any species of contract has a tendency to produce a public mischief or inconvenience, such a contract has been held to be void" (*per* Lord Ellenborough, in *Gilbert v. Sykes*, 16 *East*, 156).

II.—*Contracts which tend to violate Morality.*

RULE 72.—All contracts which tend in any way to violate morality are illegal and void

(*Walker v. Perkins*, 3 Burr. 1568; *Taylor v. Chester*, L. R., 4 Q. B. 309).

(1) **Printing Libellous Works.**—*A printer, who prints a libellous publication, or one that is indecent or blasphemous, cannot maintain an action for wages against the publisher who may employ him* (*Poplett v. Stockdale*, R. & M. 337).

“I have no hesitation in declaring that no person who has contributed his assistance to the publication of such a work can recover in a court of justice any compensation for the labour so bestowed. The person who lends himself to the violation of the public morals, shall not have the assistance of those laws to carry into execution such a purpose. It would be strange if a man could be fined and imprisoned for doing that for which he could maintain an action at law” (*per Best*, C. J.).

A printer, however, who, on discovering that the work he is printing contains libellous or indecent matter, refuses to proceed therewith, may recover for such part of the book that he has printed, and which is free from any such objection (*Clay v. Yates*, 25 L. J., Ex. 237).

(2) **Seduction.**—*A contract based on a consideration of future seduction is illegal* (*Walker v. Perkins*, *sup.*); *but past seduction is treated as no consideration at all, and, consequently, a promise founded thereon would be binding if made by deed—a consideration with such instruments not being necessary* (*Beaumont v. Reeve*, 8 Q. B. 485; *Ayerst v. Jenkins*, L. R., 16 Eq. 275).

(3) **Goods Sold or Premises Let for Immoral Purposes.**—*A person who makes a contract for sale or hire with the knowledge that the other contracting party intends to apply the subject-matter of the contract to an immoral purpose, cannot recover upon the contract; nor is it necessary, in order to prevent him from recovering, to show that he expected to be paid out of the proceeds of the immoral act.*

The defendant, a prostitute, was sued by the plaintiffs, coach-builders, for the hire of a brougham. There was no evidence that the plaintiffs looked expressly to the proceeds of the defendant's prostitution for payment; but the jury found that they knew her to be a prostitute, and supplied the brougham with a knowledge that it would be, as in fact it was, used by her as part of her display to attract men. Held, that the plaintiffs could not recover (*Pearce v. Brooks*, L. R., 1 Ex. 212).

"I have always considered it as settled law, that any person who contributes to the performance of an illegal act by supplying a thing with a knowledge that it is going to be used for that purpose, cannot recover the price of the thing so supplied. If to create that incapacity, it was ever considered necessary that the price should be bargained or expected to be paid out of the fruits of the illegal act,—it was objected, in the argument, that the allegation that the plaintiffs expected to be paid out of the receipts of the defendant's prostitution was material, and that it had not been proved—which I do not stop to examine,—that proposition has been overruled by the cases I have referred to (*Cannan v. Bryce*, 3 B. & Ad.

179; *M'Kinnell v. Robinson*, 3 *M. & W.* at p. 441), and has now ceased to be law. Nor can any distinction be made between an illegal and an immoral purpose; the rule which is applicable to the matter is—*Ex turpi causâ non actio oritur*; and whether it is an immoral or an illegal purpose in which the plaintiff has participated, it comes equally within the terms of that maxim, and the effect is the same; no cause of action can arise out of either the one or the other. . . . If, therefore, the article was furnished to the defendant for the purpose of enabling her to make a display favourable to her immoral purposes, the plaintiffs can derive no cause of action from the bargain. . . . If evidence is given which is sufficient to satisfy the jury of the fact of the immoral purpose, and of the plaintiffs' knowledge of it, and that the article was required and furnished to facilitate that object, it is sufficient, although the facts are not expressed with such plainness as would offend the sense of decency" (*per* Pollock, C. B.).

For the same reason, a lodging-house keeper cannot recover the rent due to her for rooms let, and board supplied, to a woman whom she knew to be a prostitute, and whom she was aware used the said rooms for immoral purposes (*Howard v. Howard*, 1 *Sel. N. P.*, 13th ed. 80).

CHAPTER V.

CONTRACTS ILLEGAL BY STATUTE.

CONTRACTS may be either expressly prohibited by statute, or impliedly so. Among the latter class are those which arise under statutes forbidding an act to be done under a certain penalty. In such cases the rule is as follows:—

Penalty implies a Prohibition. RULE 73.—Every contract made for, or about, any matter or thing which is prohibited and made unlawful by statute is a void contract, though the statute does not mention that it shall be so, but only inflicts a penalty on the defaulter; because a penalty implies a prohibition, though there are no prohibitory words in the statute (*per* Holt, C. J., in *Bartlett v. Vinor*, *Carth.* 252. See *Sub-rule*).

(1) In *Cope v. Rowlands* (2 *M. & W.* 149), a broker who had not been admitted under 6 Ann. c. 16, sought to maintain an action for work and labour and commission for buying and selling stock. By that statute it is enacted, that if any person shall take upon him to act as a broker, or employ any other under him to act as such, within the city of London, not being admitted as therein required (sect. 4), every such

person so offending shall forfeit to the use of the lord mayor, &c., for every such offence the sum of 20*l*. (a penalty raised to 100*l*. by 57 Geo. 3, c. 60, s. 2). Held, that the penalty implied a prohibition, and that he could not recover.

"It is perfectly settled," said Parke, B., "that when the contract which the plaintiff seeks to enforce, be it express or implied, is expressly or by implication forbidden by the common or by statute law, no court will lend its assistance to give it effect. It is equally clear that a contract is void if prohibited by a statute, though the statute inflicts a penalty only, because such a penalty implies a prohibition. . . . and it may be safely laid down, notwithstanding some dicta apparently to the contrary, that, if the contract be rendered illegal, it can make no difference in point of law whether the statute which makes it so has in view the protection of the revenue or any other object. *The sole question is whether the statute means to prohibit the contract.*"

(2) So a printer cannot recover for labour or materials used in printing any work unless he affixes his name, &c. thereto, pursuant to 39 Geo. 3, c. 79, s. 27. That statute enacts, in effect, that every person printing any paper or book intended to be published or dispersed, whether to be sold or given away, shall print upon the front of every such paper, and upon the first and last leaves of every such book, his name and usual place of abode, and every printer omitting to do the same shall be liable to forfeit 20*l*. (*Bensley v. Bignold*, 5 B. & Ald. 335).

(3) By a statute (1 & 2 Vict. c. 101, s. 3), it was

provided, that with every quantity of coal above 560 lbs. delivered in any cart or waggon in London and 25 miles round, the seller should deliver to the purchaser, on the arrival of such cart or waggon, a ticket according to a certain form, and, should he not do so, such seller should forfeit any sum not exceeding 20*l*. Held, in *Cundell v. Dawson* (4 C. B. 376), that the neglect to deliver such ticket might be pleaded in bar to an action for the price of such coals.

When the Object of the Statute is Not to Prohibit the Act done. Sub-rule.—*If the object of the statute, however, is not to prohibit the act done, but only to impose a penalty on the party offending for the purposes of the revenue, the contract will not be illegal, though the provisions of the statute are not complied with* (see judgment of Parke, B., in *Smith v. Mawhood*, 14 M. & W. 452).

Accordingly, in that case, a tobacconist, who had not complied with the Excise Acts of 6 Geo. 4, c. 81, relating to having his name over his door, and the obtaining a proper licence, was held entitled to recover for tobacco sold by him (see 2 Will. 4, c. 16, s. 11).

“The question,” observed Alderson, B., “is, *does the legislature mean to prohibit the act done or not?* If it does, whether it be for the purpose of the revenue or otherwise, then the doing of the act is a breach of the law, and no action can arise out of it. But here the legislature has merely said, that where a party carries on the trade or business of a dealer in, or seller of, tobacco he shall be liable to a certain penalty if the house in which he carries on the

business shall not have his name, &c. painted on it, in letters publicly visible and legible, and, at least, an inch long, and so forth. He is liable to the penalty, therefore, by carrying on the trade in a house in which these requisites are not complied with, and there is no addition to his criminality if he makes fifty contracts for *the sale* of tobacco in such a house. It seems to me, therefore, that there is nothing in the Act of Parliament to prohibit every act of sale, but that its only effect is to impose a penalty, for the purpose of the revenue, on the carrying on of the trade without complying with its requisites."

(a.) Gaming and Wagering. RULE 74.— All contracts or agreements, whether by parol or in writing, by way of gaming or wagering, are null and void; and no suit can be brought or maintained, in any court of law or equity, for recovering any sum of money or valuable thing, alleged to have been won upon any wager, or which shall have been deposited in the hands of any person, to abide the event on which any wager shall have been made (8 & 9 Vict. c. 109, s. 18).* But the preceding enactment does not apply to a sub-

* These contracts being rendered null and void and not absolutely unlawful, ought not, perhaps, in strictness to be dealt with in the present chapter; for the sake of convenience, however, I have followed the arrangement most commonly adopted, and classed them under the head of "Contracts Illegal by Statute."

scription, or contribution, or agreement to subscribe, or contribute for, or towards, any plate, prize, or sum of money to be awarded to the winner of any lawful game (sect. 18).

(1) The plaintiff and defendant agreed to ride a race each on his own horse, both the horses ridden to become the property of the winner. Held, that the horse could not be regarded as a contribution towards a prize within the meaning of the above proviso, and that the contract was, therefore, void under that section as being by way of gaming or wagering (*Coombs v. Dibble, L. R., 1 Ex. 248*).

(2) A dispute having arisen between the plaintiff and the defendant, during a contract for sale, as to the price of similar goods on a previous occasion, the following agreement was drawn up between them: "The plaintiff states that the goods sold by him to the defendant, and afterwards burnt, were invoiced at 5s. 9d. per cwt. of 112 lb. The defendant says that the price was 6s. per cwt. The losing man is to pay to the winner 1 gall. of best brandy. The 5 tons of rags now lying at the Salford Station are to be regulated as to price according to the above; viz., the plaintiff says they are invoiced at 5s. 9d., the defendant says 6s. It is also agreed by both parties that if the plaintiff is wrong, they are to be charged at 3s. only; if the defendant is wrong, he is to pay for the same 6s." Held, that, independently of the clause about the brandy, this was a contract by way of gaming and within 8 & 9 Vict. c. 109, s. 18, and, therefore, could not be enforced by the plaintiff in

an action for goods bargained and sold (*Rourke v. Short*, 5 *Ell. & B.* 904: 2 *Jur.*, *N. S.* 352; 25 *L. J.*, *Q. B.* 196).

(3) In *Batty v. Marriott* (5 *C. B.* 818), it was held, that an agreement whereby two persons agreed to walk a race, each depositing a sum of money with a stakeholder, the whole thereof to be handed over to the winner, was protected by the proviso in sect. 18.

This case, however, was overruled in *Diggles v. Higgs* (*inf.*), the Lord Chancellor considering such an agreement to amount to a mere wager, and remarking in reference to it, "I can see, looking at it with great care and speaking with the greatest respect of the decision, that what the court had its mind upon was that the game exercised in that case was lawful. Having arrived at the conclusion that it was lawful, they appear to have thought that there was nothing in the case that was struck at by the Act, and that the Act was merely intended to strike at unlawful games. That seems to me to overlook the beginning of the section, which appears to me to include lawful as well as unlawful games. . . . Therefore I cannot follow *Batty v. Marriott*." In the same case, the facts whereof were similar to those in *Batty v. Marriott*, Cockburn, C. J., further remarked: "I do not entertain the shadow of a doubt that it is a wager, and I do not think that such a wager is protected by the proviso at the end of sect. 18. I think that was intended to meet cases where there was a private contribution to make up prizes to be awarded to the winners of lawful games."

(4) H. and B. deposited 50% each with N., and entered into a written agreement that the 100% should be paid to H. if his horse trotted eighteen miles in an hour, and, if not, then to B. Held, affirming the decision of the Court of Common Pleas, that the above transaction amounted to nothing else than a wager, and, consequently, did not come within the proviso in sect. 18 (*Batson v. Newman* (C. A.), 1 C. P. D. 573. See also *Grizewood v. Blane*, 11 C. B. 538; *Parsons v. Alexander*, 24 L. J., Q. B. 277; 5 E. & B. 263; *Hill v. Fox*, 4 H. & N. 359).

Money paid to a Stakeholder. Sub-rule 1.—*The effect of the words “no suit shall be brought or maintained,” &c., is to prohibit the recovery by the winner from the loser of money which has been won in such a transaction as that mentioned in that part of the section, or which has been deposited by such loser in the hands of a stakeholder to abide the event; and the statute does not apply to cases wherein the party seeks to recover his own stake upon a repudiation of the wagering contract; either party being able to recover the sum he himself has deposited, although he does not demand it till after the event* (*Diggle v. Higgs*, 25 W. R. 777; L. R., 2 Ex. D. 422; *Hampden v. Walsh*, L. R., 1 Q. B. D. 189; 24 W. R. 607; *Varney v. Hickman*, 5 C. B. 271).

In *Diggle v. Higgs* the facts were as follows:—An agreement was entered into by which an equal sum of money was to be deposited by each of two competitors in a foot race, on the terms that both sums were to be paid to the winner. After the race the plaintiff

gave the defendant, the stakeholder, notice not to pay over the whole sum to the winner, and demanded his own deposit. Notwithstanding this the defendant handed over the whole amount to the winner. Held, not only, as we have seen, that this was a mere wager, but also that the plaintiff could recover the money deposited by him with the defendant, although he did not demand it till after the event.

"It is said," observed the Lord Chancellor, "that this is an action by one of the parties to the wager, who has revoked the authority of the referee and called for the money he had deposited with him, upon the principle that the contract was null and void, and it is argued that sect. 18 has taken away the right to recover. This argument is founded upon words which at first sight, no doubt, are large: No suit shall be brought or maintained in any court of law or equity for recovering any sum of money or valuable thing alleged to be won upon any wager, or which shall have been deposited in the hands of any person to abide the event on which any wager should have been made. Now, upon that, I must first observe that the Queen's Bench Division, in *Hampden v. Walsh*, appears to have held that an action of this kind is maintainable; and in *Batson v. Newman* the objection, as far as I can observe, was not taken. However, be that as it may, the objection cannot be maintained. I agree with the Queen's Bench Division. As I read the section it amounts to this. It declares that all contracts by way of wagering and gaming should be void; and then dealing with actions upon those contracts, which

might otherwise be maintained, it declares no court of law or equity shall entertain them; that is to say, the contract itself is null and void, and the *particular parties* to the contract shall not maintain any suit either against his *antagonist in the wager* or against the *stakeholder* to recover the money he says he has won. That makes the one member of the sentence correspond with the other. What consequences may follow, what legal right there may be to recover the money paid upon the contract declared void, the statute leaves unprovided for. That seems to me to meet the whole of the arguments in this case. With great respect to the learned judge (Huddleston, B.), I think the judgment he has entered for the defendant should be entered for the plaintiff."

(2) Again, A. and B. agreed to deposit each of them 500*l.* in a bank in the name of C., who was to give his cheque for the whole of 1,000*l.* to B. if he proved by measurement to C.'s satisfaction the curvature of a canal: but, if B. failed in such proof, C. was to pay the whole amount to A. B. duly proved the curvature of the canal to C.'s satisfaction, who thereupon gave notice that he should pay the 1,000*l.* to B. A., objecting to the decision, demanded his 500*l.* back from C., who, however, paid it to B. Held, firstly, that the above agreement amounted to a mere wager; and, secondly, that A. was entitled to recover his 500*l.* from C. (*Hampden v. Walsh, sup.*).

Money paid on Behalf of One who has Lost a Wager. Sub-rule 2.—*Since the Act does not render wagering contracts illegal, but only void, a*

person who has paid a sum of money at the request and on behalf of another, may recover the same, even though he knew at the time of doing so, that he was paying that which had been lost in a wager made by or with the person on whose behalf he paid (Knight v. Cambers, 15 C. B. 562; Rosewarne v. Billing, 15 C. B., N. S. 316).

(b.) Wager Policies. RULE 75.—No insurance shall be made by any person or persons, bodies politic or corporate, on the life or lives of any other person or persons, or on any other event whatsoever, wherein the person or persons for whose benefit, or on whose account such policies shall be made shall have no interest, or by way of gaming or wagering; and every insurance made contrary to the true intent and meaning hereof shall be null and void to all intents and purposes (14 Geo. 3, c. 48, extended to Ireland by 29 & 30 Vict. c. 42). The name of the person interested, or for whose benefit, or on whose account the policy is made, must be inserted therein (sect. 2).

Marine insurances are by sect. 4 expressly excluded from the operation of this Act, although, as will be seen, by the insertion of the words "or any event whatsoever," it is wide enough to embrace all other kinds. Insurances on ships, or any goods, merchandises, or effects laden or to be laden thereon,

by way of wagering or gaming are rendered unlawful and void by 19 Geo. 2, c. 37 (see also 28 Geo. 3, c. 56).

Nature and Duration of Interest. Sub-rule.—*The interest required is a pecuniary one (Halford v. Kymer, 10 B. & C. 725), and must exist at the time at which the policy is effected; nor can any greater amount be recovered than the value of the interest at that date; but this amount is recoverable in the case of a life insurance, whether such interest has subsequently ceased or not (Dalby v. The India and London Life Assurance Co., 15 C. B. 365).*

(1) In *Halford v. Kymer* (10 B. & C. 725), a father effected a policy of assurance in his own name on the life of his son. Held, that such a policy was void.

“It is enacted that no greater sum shall be recovered than the amount of the value of the interest. Now what was the amount of the value of the interest in this case? Certainly, not one farthing. If a father wishing to give his son some property to dispose of, make an insurance on his son’s life, in his (the son’s) name, not for his (the father’s) own benefit, but for the benefit of his son, there is no law to prevent his doing so; but this is a transaction quite different from the present” (*Per Bayley, J.*).

(2) But every man is presumed to have an interest in, and can insure, his own life; unless, indeed, his doing so is a mere subterfuge for evading the act (*Wainwright v. Bland, 1 M. & W. 32*); and, by

the Married Women's Property Act (s. 10), a married woman is empowered to effect a policy of insurance upon her own life, or on the life of her husband, for her sole and separate use.

(3) A creditor may insure the life of his debtor to the extent of his debt; but in *Godsall v. Boldero* (2 Sm. L. Ca. 260), it was held, that such a contract is substantially a contract of indemnity against the loss of the debt; and, therefore, if after the death of the debtor, his executors pay the debt to the creditor, the latter cannot afterwards recover upon the policy.

But this case was overruled in *Dalby v. The India and London Life Ass. Co.*, above cited, and it was there said that "this species of insurance in no way resembles a contract of indemnity," but that "the liability of the assurer becomes constant and uniform to pay an unvarying sum on the death of the *cestui que vie*, in consideration of an unvarying and uniform premium paid by the assured. The bargain is fixed as to amount on both sides." With marine and fire insurances the case is different, and these "are both properly contracts of indemnity, the insurer engaging to make good, within certain limited amounts, the losses sustained by the insured to their buildings, ships, and effects."

(c.) Contracts made on a Sunday. RULE 76.—By the Lord's Day Act (29 Car. 2, c. 7, s. 1), it is enacted, that no tradesman, artificer, workman, labourer, or other person whatsoever, shall do or exercise any worldly

labour, business, or work of their ordinary callings, upon the Lord's day, or any part thereof (works of necessity and charity only excepted); and every person being of the age of fourteen years, or upwards, offending in the premises, shall, for every such offence, forfeit five shillings. Any contract, therefore, tending to effect an infringement of this section is illegal.

Construction of the Words "or other person whatsoever." Sub-rule.—*These words must be taken only as referring to those persons who can reasonably be said to come within the description of those actually specified.*

Examples of Rule and Sub-rule. (1) A contract by a farmer for the hire of a labourer is valid, though made on a Sunday; firstly, because a farmer does not come within the class mentioned in the act; and, secondly, even supposing him to do so, a contract for hire cannot be said to be an act done in the exercise of his ordinary calling (*R. v. Whitnash*, 7 B. & C. 596).

"Things which are repeated *daily* or *weekly* in the course of trade, or business, are parts of the ordinary calling of a man exercising such trade or business; but the hiring of a servant for a year does not come within the meaning of those words" (*Per Bayley, J.*).

(2) A horse-dealer who buys a horse on a Sunday cannot maintain an action for breach of warranty

against the vendor (*Fennel v. Ridler*, 8 D. & R. 204; 5 B. & C. 406); but there is nothing to prevent a person, who is not a horse dealer, selling a horse on the Lord's day, for such act, not being within the scope of his ordinary calling, would not be affected by the statute (*Drury v. De Fontaine*, 1 Taunt. 131).

(3) An attorney is not within the act; but, presuming him to be so, an agreement, by which he undertakes personally to become responsible for a part of a debt owing by his client, is not an act coming within his ordinary calling (*Peate v. Dicken*, 1 Cr. M. & R. 422).

(4) A guaranty given by one tradesman to another for the faithful services of a traveller about to be employed by that other, is not an act done within the ordinary calling of such tradesman (*Norton v. Powell*, 4 M. & Gr. 42).

The Contract must be Completed on the Sunday. Sub-rule 2.—*A contract made on a Sunday, and in all other respects coming under the act, will not be void, unless everything has been done to render it binding upon the parties, for until this is the case the contract is not completed, and the statute will not apply* (*Chitty*, 388; *Beaumont v. Brengori*, 5 C. B. 301).

Thus, if there be a verbal contract on a Sunday for the purchase of a horse above the value of 10*l.*, but neither is the animal delivered on that day, nor the price, nor any part thereof, paid, nor earnest given, the contract will not be void under the Lord's Day Act; since, owing to the Statute of Frauds, there never was a binding contract on that particular day

(see *Bloxsome v. Williams*, 3 B. & C. 232; and *Statute of Frauds*, 29 Car. 2, c. 3, s. 17).

Where the goods Sold on a Sunday are Kept, and there is a subsequent Express Promise to Pay for them. Sub-rule 3.—*Where goods are bought on a Sunday under a contract which would be void under the act, the purchaser may nevertheless make himself liable upon a quantum meruit by retaining the goods, and subsequently expressly promising to pay for them (Williams v. Paul, 6 Bing. 653). The mere fact, however, of the vendee retaining the goods will not be sufficient to impose a liability upon him (Simpson v. Nicholls, 3 M. & W. 240).*

(d.) Contracts for the Sale of Public Offices. RULE 77.—All contracts for the sale or deputation of any office, which concerns in any way the administration of justice, or the receipt, payment, or control of the sovereign's rent, monies, revenue, or customs, or the clerkship of any court of record wherein justice is to be administered, are void (5 & 6 Edw. 6, c. 16). So, also, by 49 Geo. 3, c. 126, s. 1, are all sales or deputations of any office in the gift of the crown, or of any place appointed by the crown, or of any commission, civil, naval, or military (in respect of military commissions, however, see sect. 7, and also 34 & 35 Vict. c. 86), or of any place or employment under

the home government, or in the colonies or East Indies, or in Scotland or Ireland.

Other Illegal Sales. Besides the illegal sales which have been noticed, there are many others that might be mentioned, of which the following, perhaps, are the most important:—

1. By 1 & 2 Will. 4, c. 32, s. 4, the buying or selling of any bird of game, after the expiration of ten days from the day on which it becomes unlawful to kill or take such birds, is forbidden.

2. By 31 & 32 Vict. c. 121, s. 17, all poisons are prohibited being sold, except under certain regulations.

3. By 24 Geo. 2, c. 40, s. 12, no person shall be entitled to maintain any action to recover any sum of money for, or on account of, any spirituous liquors, unless such debt shall have really been *bonâ fide* contracted at one time, to the amount of 20s. or upwards; nor shall any particular item or article, in any account or demand for distilled spirituous liquors, be allowed and maintained, where the liquors, delivered at the time, and mentioned in such article or item, shall not amount to 20s. at least, and that without fraud or covin. By 25 & 26 Vict. c. 38, so much of this enactment as refers to spirituous liquors sold, to be consumed elsewhere than on the premises where sold, and delivered at the residence of the purchaser thereof, in quantities of not less at one time than a reputed quart, is repealed. A somewhat similar enactment respecting ale, cider, &c. is to be found in 30 & 31 Vict. c. 142, s. 4.

This statute has been held not to be applicable to spirits supplied by an hotel-keeper to a guest residing in his hotel (*Proctor v. Nicholson*, 7 C. P. 67).

(A list of agreements that are rendered unlawful by statute will be found in Mr. Pollock's *Principles of Contract*, p. 343.)

CHAPTER VI.

FRAUDULENT CONTRACTS.

Effect of Fraud upon a Contract as between the parties thereto. RULE 78.—Where a person has been induced to enter into a contract by the fraudulent misrepresentation or conduct of the other contracting party, the effect of such fraudulent misrepresentation or conduct is not to make the contract void but voidable: “that is to say, it gives an option to the person defrauded to disaffirm the contract, but until he does so such contract remains good” (see judgment of Brett, J., in *Hawes v. Harness*, *L. R.*, 10 *C. P.* 166: *Clough v. L. N. W. R. Co.*, *L. R.*, 7 *Ex.* 26: *Rogers v. Hadley*, 2 *H. & C.* 247: *Moyce v. Newington*, *L. R.*, 4 *Q. B. D.* 32. See, also, *Central R. Co. of Venezuela v. Kisch*, *L. R.*, 2 *H. L.* 99).

Meaning of the Expression “Fraudulent.”—It seems now settled that, in order to make a person guilty of fraud, he must have been guilty of some moral wrong; or in other words, that legal fraud, unaccompanied by moral fraud, will fail to

support an action *ex delicto*, or to give a right to rescind a contract (*Chitty*, 632). But, though it is necessary that the person making the statement should have committed some moral turpitude, it is by no means essential to show that he knew as a fact what he stated was false. "I conceive," observes Maule, J., "that if a man, having no knowledge whatever on the subject, takes upon himself to represent a certain state of facts to exist, he does so at his peril; and if it be done either with a view to secure some benefit to himself, or to deceive a third person, he is in law guilty of a fraud, for he takes upon himself to warrant his own belief of the truth of that which he so asserts" (*Evans v. Edmunds*, 13 C. B. 786). Or again, in *Taylor v. Ashton* (11 M. & W. 401), Parke, B. remarks—"There may, undoubtedly, be a fraudulent representation, if made dishonestly, of that which the party does not know to be untrue, *if he does not know it to be true*" (See *Reese River Silver Mining Co. v. Smith*, L. R., 4 H. L. 79; also the remarks in *Underhill on Torts*, 2nd Edit., p. 202).

NOTE.—In equity it has been said, that a contract may be rescinded, even when the person making the statement believed it to be true, if, in fact, it was not true (*Leather v. Simpson*, 11 Eq. 398, *per Malins*, V.-C.; but see *Pulsford v. Richards*, 17 Beav. 94).

During what Time a Contract can be Rescinded on the Ground of Fraud. Sub-rule.—"*We think that so long as he, the contractee, has made no election, he retains the right to*

determine it either way, subject to this, that if in the interval, whilst he is deliberating, an innocent third party has acquired an interest in the property, or if, in consequence of his delay, the position of even the wrong doer is affected, it will preclude him from exercising his right to rescind, and lapse of time without rescinding will furnish evidence that he has determined to affirm the contract; and when the lapse of time is great, it probably would in practice be treated as conclusive evidence to show that he has so determined" (Per Mellor, J., in *Clough v. L. & N. W. R. Co.*, *sup.*).

A Principal's Liability for the Fraud of his Agent. RULE 79.—Though, as previously stated, in order to enable a person to rescind a contract, the other contracting party must have been guilty of some moral fraud, yet it is now settled law that, for this purpose, the fraud of the agent is the fraud of the principal (*Murray v. Mann*, 2 Ex. 538; *Barwick v. English Joint Stock Co.*, L. R., 2 Ex. 259; *Bank of Scotland v. Addie*, L. R., 1 H. L. Sc. 145; *Mackay v. Commercial Bank of New Brunswick*, L. R., 5 P. C. 394).

The above cases will also show that a principal may be sued *ex delicto* for the fraud committed by his agent.

The Effect of Fraud as against Third Parties. RULE 80.—It would seem that the

plea of fraud would avail even as against a third person, who has *bonâ fide* and for value acquired the right of action against the defendant; provided the latter has not been guilty of negligence.

Thus, the defendant, a very old man, was induced to put his name upon the back of a bill of exchange by the fraudulent misrepresentation of the acceptor that he was signing a guaranty. The bill came into the hands of a *bonâ fide* holder for value, who sued the defendant as indorsee thereof. Held, that, unless the defendant had been guilty of negligence, he was not liable (*Foster v. Mackinnon*, *L. R.*, 4 *C. P.* 704).

Non-Disclosure of Defects in Contract of Sale. RULE 81.—“A person is not guilty of fraud who offers a defective chattel for sale where nothing is said about quality and condition, and nothing is done to conceal the defect, even though he knows of such defect, and knows, also, that if the purchaser even suspected him of the knowledge he would not buy” (*Ward v. Hobbs*, *L. R.*, 3 *Q. B. D.* 162; 4 *App. Ca.* 13).

In *Smith v. Hughes* (*L. R.*, 6 *C. P.* 597) Lord Blackburn remarked: “Even if the vendor was aware that the purchaser thought the article possessed that quality, and would not have entered into the contract unless he had so thought, still the pur-

chaser is bound, unless the vendor was guilty of some fraud or deceit upon him, and a mere abstinence from disabusing the purchaser of that impression is not fraud or deceit; for, whatever may be the case in a court of morals, there is no legal obligation on the vendor to inform the purchaser that he was under a mistake not induced by the vendor."

So, where a vessel was sold with all faults, but the seller knew of a latent defect, but made no representation in fact, nor did anything to conceal the defect, it was held that his knowledge of the latent defect, gave no right to the purchaser to complain of the purchase (3 *Camp.* 154).

Sub-rule.—*Where, however, the vendor does something actively to deceive the buyer, as by concealing the defect by some artificial means, the buyer would not be bound by his contract (see Schneider v. Heath, 3 Camp. 506).*

PART III.

HOW A SIMPLE CONTRACT MAY BE MADE,

&c., &c.

CHAPTER I.—GENERAL RULE—CONTRACTS COMING
UNDER THE 4TH SECTION OF THE
STATUTE OF FRAUDS.

II.—CONTRACTS COMING UNDER THE 17TH
SECTION OF THE STATUTE OF
FRAUDS—UNDER THE STATUTES OF
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III.—THE STATUTES OF LIMITATION, AND
THEIR EFFECT ON SIMPLE CON-
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SECT. 1.—*Performance.*

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PART III.

HOW A SIMPLE CONTRACT MAY BE MADE.

CHAPTER I.

GENERAL PRINCIPLES, AND CONTRACTS COMING UNDER THE STATUTE OF FRAUDS.

How a Contract may be Made. RULE 82.
—Except in the cases hereinafter mentioned,
a simple contract may be made either verbally
or by writing.

Sub-rule.—The terms of a contract, whether entered into verbally or by writing, must be ascertained or legally ascertainable, for should they be vague or indefinite, the contract will fail to be binding on the parties, nor will Equity decree specific performance thereof. Any particular or technical form, however, is not required.

The plaintiff was a brewer and in partnership with A. ; it was proved that on the retirement of A. from business, the plaintiff entered into negotiations for a partnership with the defendant, and evidence was

given to show that *some* agreement had been made between the parties, but it did not at all appear what its specific terms were. Held, that an action of *assumpsit* brought for not entering into partnership could not be maintained, the contract, not mentioning what the terms of the partnership were to be, being too indefinite (*Figes v. Cutler*, 3 *Star*, 139).

As to specific performance of a contract being refused on the same ground, see *Cooper v. Hood*, 28 *L. J.*, *Ch.* 212.

Contracts coming under the Statute of Frauds (29 *Car.* 2, *c.* 3).—By the 4th section of the Statute of Frauds it is enacted that no action shall be brought (a) to charge any executor or administrator upon any special promise to answer damages out of his own estate; or (b) whereby to charge a defendant upon any special promise to answer for the debt, default, or miscarriage of another person; or (c) to charge any person upon any agreement made upon consideration of marriage; or (d) upon any contract or sale of lands, tenements, or hereditaments, or any interest in or concerning them; or (e) upon any agreement that is not to be performed within the space of one year from the making thereof; unless the agreement, upon which such action shall be brought, or some note or memorandum thereof, shall be in writing and signed by

the party to be charged therewith, or some other person thereunto by him lawfully authorized.

By the 17th section it is further provided, that no contract for the sale of any goods, wares, or merchandises for the price of 10*l*. or upwards shall be good, except the buyer shall accept part of the goods so sold, and actually receive the same; or give something in earnest to bind the bargain, or in part payment; or that some note or memorandum in writing of the said bargain be made and signed by the parties to be charged by such contract, or their agents thereunto lawfully authorized.

(Besides these sections, there are others relating to parol assignments of land, nuncupative wills, declarations of trust, &c. See sects. 1, 2, 3, 5, 6, 7, 19, 20.)

In the present and following chapter, I purpose discussing each of the above-cited sections, pointing out to what contracts they apply, and stating generally the most important decisions respecting them. It will be seen, that in respect of the note or memorandum of the agreement or bargain required by the statute, both the 4th and the 17th sections contain substantially the same enactment; consequently, in dealing with the formalities that must, in either case, be observed in order that there may be a sufficient writing to satisfy the act, these sections may, for the present, be considered together.

What is a sufficient Memorandum.
RULE 83.—The memorandum that is relied upon to satisfy the Statute of Frauds must contain (1) the terms and subject-matter of the contract; (2) the consideration (except in the case of a guaranty, see 19 & 20 Vict. c. 97, s. 3; and in cases coming under the 17th section, when it need not *necessarily* be stated, see 1 *Sm. L. Ca.* 316; *Poll. on Con.* 145); (3) the names of the parties, or a sufficient description of them; and (4) the signature of the party to be charged, or his agent.

Names of the Parties. Sub-rule 1.—*It is not necessary that the actual names of the contracting parties should be stated; "it is sufficient if there is such a description of them as to leave no reasonable doubt as to their identity."*

In *Potter v. Duffield* (*L. R.*, 18 *Eq.* 4), the term "vendor" inserted in certain particulars of sale was held not to be a sufficient description of one of the contracting parties; though, in a similar case, the word "proprietor" was deemed to be so (*Sale v. Lambert*, *L. R.*, 18 *Eq.* 1. See *Rossiter v. Miller*, *L. R.*, *Ch. D.* 648; *Beer v. London and Paris Hotel Co.*, 20 *Eq.* 412). So, also, a memorandum of a contract for the sale of lands, wherein the vendor was not named, but was stated to be "a trustee selling under a trust for sale," was held to contain a sufficient description of the defendant (*Catling v. King*, *L. R.*, 5 *Ch. D.* 660). In *Vandenbergh v. Spooner*

(*L. R.*, 1 *Ex.* 316), the memorandum ran thus: "S. (the defendant) agrees to buy the whole of the lots of marble purchased by V. (the plaintiff), now lying at L. C., at 1s. 8d. a foot. (Signed) S." Held, that the statute was not satisfied, as it did not appear that V. was the seller. For further examples, see *Newell v. Radford* (*L. R.*, 3 *C. P.* 52); *Graham v. Musson* (7 *Scott*, 769); *Williams v. Byrnes* (1 *Moore, P. C.*, *N. S.* 154); *Hood v. Barrington* (*L. R.*, 6 *Eq.* 218).

What is sufficient Signature? Sub-rule 2.

—*The memorandum or note only requires the signature of the party who is to be charged, or his agent (Laythoarp v. Bryant, 2 Bing. N. C. 735); therefore, a written proposal signed by the defendant, and accepted verbally by the person to whom it is made, will bind the former (Reuss v. Picksley, L. R., 1 Ex. 342). The signature need not be written at the end of the memorandum, the words "I, A. B., agree," &c., at the commencement thereof, will suffice to constitute a good signature by A. B. (Knight v. Crockford, 1 Esp. 190). So, also, will the statute be deemed satisfied where the defendant's name is printed by his consent (Saunderson v. Jackson, 2 B. & P. 238; Schneider v. Norris, 2 M. & S. 288); or where he has merely made his mark (Baker v. Dening, 8 A. & E. 94), or written his initials (see 2 Sm. L. Ca. 256). A telegram containing the name of the sender and receiver constitutes a sufficient memorandum (Godwin v. Francis, L. R., 5 C. P. 295). It is important to note, that though an agent may bind his principal by signing on his behalf, one party to the contract cannot sign as*

the agent of the other (Farebrother v. Simmons, 5 B. & A. 333; Sharman v. Brandt, L. R., 6 Q. B. 720; Peirce v. Corf, L. R., 9 Q. B. 210; see notes to Wain v. Warlters, 2 Sm. L. Ca. 24).

Memorandum may be collected from Several Documents. Sub-rule 3.—*The whole of the agreement or memorandum need not appear on one paper, but may be gathered from several documents, provided they appear on the face of them to be connected, by reference, sense, or otherwise, one with another (Boydell v. Drummond, 11 East, 142; Baumann v. James, L. R., 3 Ch. 508; Nesham v. Selby, L. R., 7 Ch. 406; Wilkinson v. Evans, L. R., 1 C. P. 40).*

In *Gibson v. Holland (L. R., 1 C. P. 1)*, a letter, written and signed by the defendant to his own agent, referring to letters of the agent, stating the terms upon which the latter has made a contract on his behalf with the other party for the purchase of goods, was held to be a sufficient memorandum.

When the Memorandum must Exist. Sub-rule 4.—*It is necessary that the written memorandum relied upon should exist at the time of action brought (Bill v. Bament, 9 M. & W. 36).*

(a.) Promises by an Executor or Administrator to answer Damages out of his own Estate.—Under this clause was decided the leading case of *Rann v. Hughes (7 T. R. 350)*, which held, “that a mere written contract by an executor to answer damages out of his own estate will not make him liable thereon, unless such a promise is

supported by a valuable consideration; in agreements of this description, as in all others coming under the Statute of Frauds, the act not taking away any of the common law requisites of a contract, but only adding an additional one thereto—viz., the necessity of a writing.

(b.) Special Promises to answer for the Debt, Default, or Miscarriage of Another.

—The following rules should be remembered in considering to what agreements this clause applies.

1. The liability undertaken by the promisor must be *collateral*, and not *direct*, since the words of the statute are: “to answer for the debt, default, or miscarriage of another” (*Mountstephen v. Lakeman*, *L. R.*, 7 *H. L.* 17).

(1) This is often and perhaps best explained by the following example.—“If two come into a shop and one buys, and the other to gain him credit promises the seller ‘If he does not pay, I will;’—this is a collateral liability and void without a writing. But, if he says, ‘Let him have the goods, I will see you paid;’ this is an undertaking as for himself, and he shall be intended to be the very buyer and the other to act but as his servant:” or, in other words, this is a direct liability, and therefore not within the act (*Byrkmyr v. Darnell*, 1 *Sm. L. Ca.* 310).

(2) Whether the liability, however, is direct or collateral depends, perhaps, more on the surrounding circumstances than on the actual words that are used. For instance, it is quite possible that words very similar to those that were held to evidence a direct

engagement in the case just stated, might, owing to peculiar circumstances, constitute a collateral undertaking. Thus, in *Keate v. Temple* (1 B. & P. 158), a young lieutenant in the navy ordered clothes to the amount of 576*l.* to be supplied to the crew of his vessel, and he promised "to see the plaintiff paid at the pay table." Held, taking into consideration the defendant's position, the extent of the order, and the improbability of his intending to make himself primarily answerable for the goods supplied, that his undertaking was collateral, and, not being in writing, did not bind him. The court was further of opinion that the plaintiff himself must have given credit not to the officer, but to the pay fund, out of which the crew were paid, and over which the defendant presided. See further *Mountstephen v. Lakeman* (L. R., 7 H. L. 17); *Leathley v. Spyers* (L. R., 5 C. P. 595); *Heffield v. Meadows* (L. R., 4 C. P. 595); *Lawrie v. Scholefield* (*Id.* 622).

(3) For the same reason, also, it will be seen that the debt for which another makes himself responsible must be one for which the person who owes such debt continues liable, otherwise the liability becomes direct and not collateral. This, indeed, is only another example of the present rule (par. 1). Thus, a promise by A. to pay B. a sum of money if he would release C., his debtor, whom he had taken in execution, was held not to require a writing, inasmuch as the effect of a creditor discharging a debtor out of execution was to extinguish the debt, and that, therefore, A.'s promise was not to answer for the debt of another (*Goodman v. Chase*, 1 B. & Ald. 297).

(4) So, again, a promise to be responsible for a debt contracted by an infant (unless such debt is one arising out of necessities supplied to him) need not be in writing, because, legally, there never is any debt owing by the infant, and the promisor's liability, therefore, is not collateral (*Harris v. Huntbach*, 1 *Burr.* 273).

2. The promise must be made to the person to whom another is already, or is about to become, responsible, and not to that other himself (*Eastwood v. Kenyon*, *sup.*; *Hargreaves v. Parsons*, 13 *M. & W.* 561).

3. It is not necessary that the debt of the third party should have arisen *ex contractu*. A promise to answer for the debt, default, or miscarriage of another, due in respect of a tort committed by that other, is equally within the section.

Thus, a promise by A. to compensate B. for injuries done to his horse by C., on consideration of his not suing the latter, must be in writing (*Kirkham v. Martyr*, 2 *B. & Ald.* 613).

As, has been already remarked, the consideration for a guaranty need no longer appear in the written agreement or memorandum thereof (19 & 20 *Vict. c.* 97, s. 3).

(c.) **Agreements made in Consideration of Marriage.** The only observation that need be made upon this clause of the 4th section is, that it does not apply to contracts to marry, but merely to collateral promises based on the consideration of marriage (*Harrison v. Cage*, 1 *Ld. Raymond*, 386; *Montacute v. Maxwell*, 1 *Str.* 236). The former agreements may

be made verbally, although, it may be stated, no plaintiff suing on a breach of promise to marry can recover unless his or her testimony is corroborated by some other material evidence in support of such promise (32 & 33 *Vict. c. 68, s. 2*; *Besselah v. Sterne, L. R., 2 C. P. D. 265*).

(d.) Contracts for the Sale of Lands, Tenements, or Hereditaments, or any Interest in or concerning them. The difficulty most frequently arising in this clause is to determine what is and what is not an interest in or concerning land. It is impossible to state any exact rule on the subject, and I must content myself by giving a few of the most important decisions thereon by way of example. A contract to convey an equity of redemption is clearly respecting an interest in land and must be in writing (*Massey v. Johnson, 1 Ex. 241*): so is a contract to allow a person to draw water from a particular well (*Tyler v. Bennet, 5 A. & E. 377*); or an agreement to let furnished lodgings (*Inman v. Stamp, 1 St. 12*; *Edge v. Stafford, 1 C. & J. 391*): or a contract by a landlord to put certain furniture into a house, the plaintiff, in consideration thereof, agreeing to become his tenant (*Mechelen v. Wallace, 7 A. & E. 49*): or an agreement whereby a defendant undertakes to procure a lease of land for the promisee, wherein he (the defendant) has no interest (*Horsey v. Graham, L. R., 5 C. P. 9*). But a contract for board and lodging merely (*Wright v. Stavert, 2 E. & E. 721*), or for the sale of shares in a railway company (*Duncraft v. Albrecht, 12 Sim. 189*), or in a canal company (*Bligh v. Brent, 2 Y. &*

C. 268); or, as a rule, in any joint stock company possessing land (*Myers v. Perigal*, 22 L. J., Ch. 431), is not within the act. An agreement for the use of a dock for the purpose of repairing a vessel, the possession and control of the dock owner not being excluded by the terms thereof, need not be in writing (*Wells v. Kingston-upon-Hull, L. R.*, 10 C. P. 402. See further, *Morgan v. Griffith, L. R.*, 6 Ex. 70; *Erskine v. Adeane, L. R.*, 8 Ch. 756).

Growing Crops, &c.—A contract for the sale of any growing natural production of the earth, such as grass or wood, is considered as being a contract for the sale of an interest in, or concerning, land (*Crosby v. Wadsworth*, 6 East, 602; *Rodwell v. Phillips*, 9 M. & W. 501), unless such production is sold in contemplation of an immediate severance from the soil, in which case it is treated merely as a chattel (*Washbourn v. Burrows*, 1 Ex. 115; *Smith v. Surman*, 9 B. & C. 561). But, if the subject matter of the contract is not the natural production of the soil, but something that is raised by labour and industry (*fructus industriales*), such as corn or potatoes, then whether an immediate severance is contemplated or not, the section does not apply (*Evans v. Roberts*, 5 B. & C. 829; *Sainsbury v. Mathews*, 4 M. & W. 343; *Marshall v. Green, L. R.*, 1 C. P. D. 35).

Contracts that are not to be Performed within a Year.—A contract has been held not to come within this clause, and, consequently, not to need a writing:

(1) Where it is doubtful, or uncertain, whether it will be performed within a year; the section applying

only to agreements that are *not* to be so performed (*Peters v. Compton, Skinner*, 353).

Accordingly, a contract whereby A. for a valuable consideration agreed to leave B. a certain sum of money, whenever he (A.) should die, was held to be binding, though made by parol (*Ridley v. Ridley*, 34 *L. J.* 462). *Aliter*, where the agreement was for a year's service, to commence at a future date (*Bracegirdle v. Heald*, 1 *B. & A.* 722).

(2) When all that is to be done by the one party, constituting an entire consideration for the promise of the other party, is capable of being performed within the year; although the performance of the promise by the other is intended to be postponed beyond that time (*Smith v. Neale*, 2 *C. B.*, *N. S.* 67; *Donellan v. Read*, 3 *B. & Ad.* 899). So, an agreement to sell goods and deliver the same within a year need not be in writing under this section, although the vendee be not bound to pay for them till after the twelve months (*Smith v. Neale*; see *Banks v. Crossland*, *L. R.*, 10 *Q. B.* 97).

(3) Where the consideration for the promise is executed (*Souch v. Strauchbridge*, 2 *C. B.* 808; see *Knowlman v. Bluett*, *L. R.*, 9 *Ex.* 1).

Part Performance. RULE 84.—Equity will give relief and decree specific performance of a contract coming under this section (although there has been no written memorandum thereof to satisfy the act) where

there has been a part performance of such contract by the party praying relief (*Caton v. Caton*, *L. R.*, 1 *Ch. Ap.* 137; *Mundy v. Jolliffe*, 5 *M. & C.* 177; see *Cairns' Act*, whereby the courts are further empowered to award damages, 21 & 22 *Vict. c.* 27).

What Amounts to Part Performance.

Sub-rule.—“*It is in general the essence of such an act that the court shall by reason of the act itself, without knowing whether there was an agreement or not, find the parties unequivocally in a position different from that which, according to their legal rights, they would be in if there was no contract.*”

“Of this a common example is the delivery of possession. One man, without being amenable to the charge of trespass, is found in the possession of another man's land; such a state of things is considered as showing unequivocally that some contract has taken place between the litigant parties, and it has, therefore, on that specific ground, been admitted to be an act of part performance” (*per Wigram*, *V.C.* in *Dale v. Hamilton*, 5 *Hare*, 381).

See further as to what is considered part performance, *Foxcroft v. Lester*, 1 *Tudor's L. C.* 768; *Brennan v. Bolton*, 2 *Dr. & War.* 349; *Wills v. Stradling*, 3 *Ves.* 378; *Pain v. Coombs*, 1 *De J. & Jo. p.* 34. Marriage alone is not a part performance of an oral agreement coming under the third clause of the section (*Surcombe v. Pinniger*, 3 *De G. M. & G.* 571).

CHAPTER II.

CONTRACTS COMING UNDER THE 17TH SECTION OF
THE STATUTE OF FRAUDS, AND UNDER THE
STATUTE OF LIMITATION, &c., &c.

Sales coming under the 17th Section of the Statute of Frauds. RULE 85.—By this section it is enacted that no contract for the sale of any goods, wares, or merchandises for the price of 10*l.* sterling, or upwards, shall be allowed to be good, except (1) the buyer shall accept part of the goods so sold, and actually receive the same; or (2) give something by way of earnest to bind the bargain; or (3) in part payment; or (4) that some note or memorandum in writing of the said bargain be made and signed by the parties to be charged by such contract, or their agents thereunto lawfully authorized. By Lord Tenterden's Act (9 Geo. 4, c. 14, s. 7) it is further provided, that the above section shall extend to all contracts of the value of 10*l.* sterling and upwards, notwithstanding that the goods may be intended to be delivered at some future time, or may not

at the time of such contract be actually made, or procured, or ready for delivery, or that some act may be requisite for rendering the same fit for delivery.

This last-cited section must be read with the 17th section of the Statute of Frauds, as if incorporated therein (*Harman v. Reeve*, 18 C. B. 587).

What Contracts are within the Section.

—It has been held that this section does not apply to shares in a railway company (*Bowlby v. Bell*, 3 C. B. 284), or in a mining company (*Watson v. Spratley*, 10 Ex. 222), or in joint stock companies (*Humble v. Mitchell*, 11 A. & E. 205). Nor is a contract for the sale of foreign stock within the section (*Hazeltine v. Siggers*, 1 Ex. 856), though a sale by auction (*Kenworthy v. Scholefield*, 2 B. & C. 945), or in market overt, is so. (See *Hinde v. Whitehouse*, 7 East, 558.) A question frequently arising under this 17th section of the Statute of Frauds is, whether the contract on which the defendant is sought to be made liable is really an agreement for the sale of an article, or whether, in fact, it is merely a contract for work and labour done and materials provided. The following is the test stated by Mr. Justice Blackburn in *Lee v. Griffin*, 1 B. & S. 272, as the one to be relied upon.

Sub-rule 1.—“*In all these cases, in order to ascertain whether the action ought to be brought for goods sold and delivered, or for work and labour done and materials provided, we must look at the particular contract entered*

into between the parties. If the contract be such that, when carried out, it would result in the sale of a chattel, the party cannot sue for work and labour ; but if the result of the contract is that the party has done work and labour which ends in nothing that can become the subject of a sale, the party cannot sue for goods sold and delivered."

In that case, the facts were these—A. had verbally ordered of B. a set of artificial teeth, which were to be fitted to her mouth ; before this was done she died. Held, that B. could not sue A.'s executor for work and labour done and materials provided for his testatrix, the above contract being for the sale of goods.

It was at one time thought that whether a contract was for the sale of goods, or for work and labour, depended on the extent of the value of the labour required to produce the article ; for did the value of the work expended thereon exceed that of the material, as in the case of a picture painted by an artist, the agreement was held to be not one of sale, but one of work and labour. This test seems now to have given place to the one stated in the sub-rule, and can no longer be deemed reliable. "I do not think," observed Blackburn, J., in *Lee v. Griffin*, "that the test to apply to these cases is, whether the value of the work exceeds that of the material."

Value of Ten Pounds—Contracts consisting of Several Items. Sub-rule 2.—*In a sale of several articles, each under the value of 10l., but amounting in the aggregate to a value equal to, or exceeding that sum, the section is applicable, provided*

that the articles so bought are bought under one entire contract.

(1) A. entered into a shop and contracted for the purchase of several articles, each of which was under the value of ten pounds, but amounted altogether to seventy. A separate price for each article was agreed upon, and he then requested that an account of the whole might be sent to his house, together with the goods. This was done, but A. refused to accept the goods on their arrival. Held, on action being brought against A., that this was one entire contract, and that, as nothing had been done to satisfy the Statute of Frauds, he was not liable (*Baldey v. Parker*, 2 B. & C. 37).

(2) But, on the other hand, in a sale of several lots by auction, where each lot is put up and knocked down separately, and the vendee's name is entered by the auctioneer in his sale book, each lot so sold would be held as being sold under a distinct contract (*Emerson v. Heelis*, 2 Taun. 38).

Where Price is Uncertain. Sub-rule 3.—*If, at the time the contract is entered into, it is uncertain what the price of the article may be, the section will apply if it ultimately turns out to be of, or over, the value of 10l. (Watts v. Friend, 10 B. C. 446).*

The Buyer must Accept Part of the Goods Sold, and actually Receive the same. There must be both an acceptance of the goods sold and a delivery thereof before the statute can be satisfied, though the former need not necessarily be con-

temporaneous with, or subsequent to, the latter, but may precede it (*Kershaw v. Ogden*, 3 H. & C. 717; *Morton v. Tibbet*, 15 Q. B. 429). What constitutes an acceptance and a delivery is frequently a very difficult question to decide, and has given rise to a vast amount of litigation. The whole subject will be found very ably and exhaustively discussed in Mr. Benjamin's book on Sales and other larger works, and I purpose here to deal with the subject as briefly as possible.

Acceptance. Sub-rule 4.—“*An acceptance of part of the goods is an assent by the buyer, meant to be final, that this part of the goods is to be taken by him as his property, and under the contract and as so far satisfying the contract. So long as the buyer can, without self-contradiction, declare that the goods are not to be taken in fulfilment of the contract he has not accepted them*” (*Blackburn on Sales*, p. 23).

This assent, it need hardly be stated, is not bound to be expressed in so many words, but may be inferred from the acts and conduct of the vendee, that is to say, the acceptance may be either express or constructive. Perhaps the best and most practical rule that can be applied in order to ascertain whether there has been an implied or constructive acceptance is this:—

What Constitutes Constructive Acceptance. Sub-rule 5.—“*Wherever the vendee has exercised some right of ownership over the goods, that have formed the subject matter of the contract, or in other words,*

wherever he has dealt with them, as if they belonged to him and were no longer the property of the vendor, he will, in law, be said to have constructively accepted the same (see *Morton v. Tibbet*, 15 Q. B. 428; *Lillywhite v. Devereux*, 15 M. & W. 285).

(1) A. agreed to purchase of B. a carriage, which was then standing in B.'s shop, and, at the same time, directed that certain alterations should be made therein. Such alterations were accordingly made, and the carriage was, at the purchaser's own request, placed in the back shop belonging to B. Some time afterwards A. called at the shop, and requested B. to hire a horse and man and to send the carriage to his house the following day, in order that he might drive it. The carriage was sent to, and used by, A., who paid for the hire and use of the horse and man, and returned it. Subsequently he refused to take or pay for it. Held, on the above facts and on it appearing, also, that A. had, more than once, desired the vendor to use the carriage, so that it might pass the custom house as a second-class carriage, that there had been a sufficient acceptance to satisfy the section, and that the purchaser was bound (*Beaumont v. Brengeri*, 5 C. B. 301).

(2) In *Chaplin v. Rogers* (1 East, 192), the defendant having agreed to buy from the plaintiff a certain quantity of hay, sold a part thereof to a third person, by whom it was removed. Held, that from his thus dealing with the hay, as if it had been his own, the jury might presume an acceptance by the vendee.

(3) The defendant verbally agreed to buy of the

plaintiff some cattle, then in his (the plaintiff's) fields, and felt in his pocket for his cheque book, so as to pay for them. Finding he had not got the cheque book with him, he told the plaintiff to come to his house in the evening for the money, and it was arranged between them that the cattle should remain in the plaintiff's fields for a few days, and that the defendant should feed them with the plaintiff's hay. This was accordingly done, but the defendant afterwards refused to complete his purchase. Held, that there was no evidence of an acceptance under the act (*Holmes v. Hoskins*, 9 Ex. 753).

(4) The defendant verbally contracted for the purchase of some sheep from the plaintiff, and directed them to be sent to a field which was his own property. This was done, and he subsequently had the sheep removed from the field to a farm, situated some miles distant, and on their arrival counted them, and said "it's all right." Held, that there was sufficient evidence of an acceptance to satisfy the section (*Saunders v. Topp*, 4 Ex. 390; 18 L. J., Ex. 374).

See further, *Kent v. Huskisson* (3 B. & P. 233); *Smith v. Hudson* (6 B. & S. 431); *Curtis v. Pugh* (10 Q. B. 111; *Tempest v. Fitzgerald* (3 B. & Ald. 680).

Receipt. Sub-rule 6.—"*The receipt of part of the goods is the taking possession of them. When the seller gives to the buyer the actual control of the goods, and the buyer accepts such control, he has actually received. Such a receipt is often evidence of an acceptance, but it is not the same thing*" (*Blackburn on Sales*, p. 23).

There is clearly a sufficient receipt by a vendee to satisfy the statute, if the goods have been removed from

the possession of the vendor into that of the vendee, or of some agent, or bailee, appointed by him; or, if the vendor continues in possession only as the bailee of the vendee: If, at the time of the contract, the goods are already in the possession of the buyer, he must do some act in respect of them inconsistent with his former possession, in order that there may be a receipt (Edan v. Dudfield, 1 Q. B. 302); while if they are in the hands of some third person, it must appear that it has been agreed between the parties, that is to say, the vendor, the vendee, and the third party, that the latter should no longer hold the goods, as bailee for the vendor, but for the vendee (see Benj. on Sales, p. 131 et seq.).

(1) A delivery to a common carrier is a delivery to the vendee, a carrier being considered the agent of the person to whom the goods are sent, and not of the person by whom they are forwarded (*Daves v. Peck*, 8 T. R. 330; *Dunlop v. Lambert*, 6 Cl. & Fin. 600).

(2) In *Elmore v. Stone* (1 Taun. 458), the plaintiff, who was a livery stable-keeper, had sold certain horses to the defendant. As the vendee had no stables of his own, it was agreed that the plaintiff should keep them at livery for him, which he did. Held, that the plaintiff, after this agreement, retained possession of the horses merely as bailee for the defendant, and that there had been a sufficient delivery.

(3) In *Edan v. Dudfield* the facts were as follows: Certain goods belonging to the plaintiff were in the custody of the defendant, for the purpose of being sold by him for the plaintiff, and ultimately it was verbally agreed between them that he (the defendant)

would take them himself at a price named. Shortly afterwards the defendant sold the goods to a third party, and, in a written account current delivered to the plaintiff, debited himself with the price of the goods as sold, not adding to or for whom. Held, that there was evidence of a sufficient receipt by the defendant.

(4) A written order given by the seller of goods to the buyer, directing a person in whose custody the goods are to deliver the same to the buyer, amounts to a delivery under the statute, if such person accepts the order, and agrees to hold the goods as bailee for the buyer (*Searle v. Keetes*, 2 Esp. 598).

Something by way of Earnest or Part Payment. Sub-rule 7.—*The thing or money that is offered by way of earnest, or the money constituting the part payment, must be actually transferred, and delivered over from the vendee to the vendor.*

So, where a purchaser simply took out a shilling, and drew it across the hand of the seller, and then put it back into his pocket again, it was held that the statute had not been complied with (*Blenkinsop v. Clayton*, 7 Taun. 597).

It would seem, however, that the actual relinquishment of a debt by way of part payment is sufficient (*Walker v. Massey*, 16 M. & W. 302, 305).

II. *Promises to Revive Debts barred by the Statute of Limitations.*

RULE 86.—In actions grounded upon a simple contract, no promise by words merely

shall be deemed sufficient evidence of a new or continuing contract, whereby to take any case out of the operation of the Statutes of Limitation (hereinafter mentioned); or to deprive any party of the benefit thereof, unless such promise shall be made or contained in some writing, to be signed by the party chargeable thereby, or by his agent thereunto lawfully authorized (9 *Geo.* 4, *c.* 14, *s.* 1; 19 & 20 *Vict.* *c.* 97, *s.* 13, and see Chapter III.).

Besides the contracts already enumerated that must of necessity be reduced into writing, there are others to which a similar requisite is attached. Among these the following may be mentioned as being the most important :—

Assignments of copyright (5 & 6 *Vict.* *c.* 45).

Transfer of ships or shares therein (17 & 18 *Vict.* *c.* 104, *s.* 55).

Marine insurances (30 *Vict.* *c.* 23, *s.* 7).

Contracts expressed in bills of exchange and other negotiable instruments.

CHAPTER III.

THE STATUTES OF LIMITATION AND THEIR EFFECT
UPON SIMPLE CONTRACTS.

Within what Time a Simple Contract must be Enforced. RULE 87.—Except in the cases hereinafter stated, every action upon a simple contract must be commenced within six years next after the cause of such action shall have arisen (21 *Jac.* 1, *c.* 16, *s.* 3; see also 19 & 20 *Vict.* *c.* 97, *s.* 9).

Debt is not Extinguished. Sub-rule.—*It must be remembered that the effect of this act is not to extinguish the debt itself, if not sued for within the prescribed time, but only to bar the remedy thereupon.*

(1) Thus, in *Spears v. Hartley* (3 *Esp.* 81), it was held that a lien possessed by a creditor was not destroyed, although the right to recover the debt, in respect of which such lien had arisen, was barred by the statute.

(2) It is on this principle that a debt that is barred by the statute has been held a sufficient consideration to support a subsequent written promise to pay the same (see 2 *Wms. Saund.* 163).

When the Statute commences to Run.—

As has been pointed out in the rule, it is from the time when the cause of action *first accrues*, and not from the date of the making of the contract, that the statute begins to operate. This must be clearly kept in view, as it will be found a ready test for determining when the right of action on a given contract is barred. The following examples will illustrate this :—

(1) Where goods are sold upon credit, the six years must be counted from the time when such credit expires, and not from the date of the sale (*Price v. Nixon*, 5 Taunt. 338; *Helps v. Winterbottom*, 2 B. & Ad. 431).

(2) In a contract of indemnity, the statute begins to run from the time of damnification (*Huntley v. Sanderson*, 1 Cr. & M. 467; *Reynolds v. Doyle*, 1 M. & Gr. 753).

(3) Where a bill of exchange is made payable at a future date for a sum of money lent by the payee to the drawer at the time of drawing the bill, the payee may recover the money, although six years may have elapsed since the money was lent—the statute not commencing to run against him till the bill becomes due (*Wittersheim v. Countess of Carlisle*, 1 H. & Bl. 631; *Wheatley v. Williams*, 1 M. & W. 533).

(4) But, in the case of a promissory note made payable on demand, the statute begins to operate at once, because, in law, a note so made becomes payable immediately (*Norton v. Ellam*, 2 M. & W. 461).

(5) Where money has been lent by cheque, the statute commences to take effect from the date when the cheque was cashed by the bank whereat it was

made payable, and not from the time when it was drawn (*Garden v. Bruce*, *L. R.*, 3 *C. P.* 300).

Disabilities. RULE 88.—By sect. 7 of the Act of James I. (above cited) it is enacted that, if at the time when the cause of action accrues, the person entitled to sue thereon is within the age of twenty-one years, or is a *fême covert*, or *non compos mentis*, or is imprisoned, or beyond the seas, such person shall be at liberty to bring the said action within six years after the infancy, coverture, mental incapacity, imprisonment, or absence beyond seas shall have terminated. (By 19 & 20 Vict. c. 97, s. 10, the exception made in respect to persons in prison or beyond seas is abolished.) It is also provided by 4 & 5 Anne, c. 16, s. 19, that if the person *against whom* the action arises is beyond seas, the action may be brought within six years after he shall have returned. (As to what is “beyond seas,” see 19 & 20 Vict. c. 97, s. 12.)

Joint Debtors. Sub-rule 1.—*Where the action is against joint debtors, some of whom are beyond seas, the statute will operate as to those that are not beyond seas* (19 & 20 Vict. c. 97, s. 11).

Subsequent Disability. Sub-rule 2.—*When once the statute has commenced to run, no subsequent*

disability can stay its operation (Smith v. Hills, 1 Wils. 134; Cotterell v. Dutton, 4 Taunt. 826).

What will take a Case out of the Operation of the Statute. RULE 89.—There must be one of the three following things to take a case out of the operation of the Statutes of Limitation; either there must be (1), an acknowledgment of the debt from which a promise to pay is to be implied; or (2), an unconditional promise to pay the debt; or (3), a conditional promise and evidence that the condition has been performed (*per Mellish, L. J., in The River Steam. Co. Case, L. R., 6 Ch. 828*).

How the Acknowledgment or Promise should be Made. Sub-rule 1.—*The acknowledgment, unless it consists of a part payment of the debt, or payment, or part payment of the interest, should, like the promise (see ante, p. 164), be in writing, signed by the party to be chargeable therewith (9 Geo. 4, c. 14, s. 1), or by his agent duly authorized (19 & 20 Vict. c. 97, s. 13).*

Examples of Rule. (1)—A letter from a debtor to his creditor contained a passage running thus:—“We have hard work to get on, but I will try and pay you a little at a time, if you will let me. I am sure that I am anxious to get out of your debt. I will endeavour to send you a little next week. Held,

that this was a sufficient acknowledgment (*Lee v. Wilmot, L. R., 1 Ex. 364*).

(2) So also the following:—"In reply to your statement of account received, I am ashamed the account has stood so long. I must beg to trespass on your kindness a short time longer, till a turn in trade takes place, as for some time things have been very flat" (*Cornforth v. Smithard, 29 L. J., Ex. 228*).

(3) Where, however, the debtor only admits his liability, and refuses to pay the debt, or reserves the matter for future consideration, or refers the creditor to some third person for payment, this will not be sufficient to prevent the operation of the statute (see *Everett v. Robertson, 1 E. & E. 16*). But a promise to pay *may* be implied from a mere admission, so long as there is nothing to rebut the implication (*Hart v. Prendergast, 14 M. & W. 141*).

(4) In an action by the payees, commenced in 1873, against one of the makers of a joint promissory note, dated the 1st of October, 1858, defendant pleaded the Statutes of Limitation. At the trial, the following letter from defendant to the plaintiff, dated the 29th of May, 1867 (at which time the statute had run), was put in:—"The old account between us, which has been standing over so long, has not escaped our memory, and, as soon as we can get our affairs arranged, we will see you are paid; perhaps, in the meantime, will you let your clerk send me an account of how it stands." Held, by Blackburn and Archibald, JJ. (Mellor, J., dissenting), that the promise in the letter might be only conditional, and was not

sufficient (without evidence to explain it) to take the case out of the statute. Held, on appeal, reversing the judgment of the Queen's Bench, by Cleasby, Pollock and Amphlett, BB., and Grove and Denman, JJ., that the promise in the letter was sufficient; Lord Coleridge, C. J., being of the contrary opinion (*Chasemore v. Turner*, *L. R.*, 10 *Q. B.* (*Ex. Ch.*) 500).

(5) L., in 1846, promised to pay three months after date to B., or to C. his wife, the sum of 500*l.*; B. died in 1863, leaving C. surviving. There was an indorsement on the note in L.'s handwriting of his name and the year 1866: C. died in 1868. Held, that it was not intended to make a new note, and that there was a sufficient acknowledgment to exclude the operation of the statute (*Bourdin v. Greenwood*, *L. R.*, 13 *Eq.* 281).

(6) In the recent case of *Meyerhoff v. Frochlick* (*L. R.*, 3 *C. P. D.* 333; 4 *C. A.*, *C. P. D.* 63), the facts were as follows:—In May, 1874, the defendant, in answer to a demand of a debt incurred by him in 1865, wrote to the plaintiffs as follows:—"Believe me that I never lose out of sight my obligation towards you, and that I shall be glad, as soon as my position becomes somewhat better, to begin and continue with my instalments." It was admitted that in one year since 1874, the defendant's income had been 14*l.* more than it was and since had been. Held, that, assuming the letter to amount to such an acknowledgment as to warrant the inference of a promise to pay, it was a conditional promise only, and that there was no affirmative proof of the substantial fulfilment of the condition.

Acknowledgment by Part Payment of Debt. Sub-rule 2.—*The payment must be intended to be applied in part discharge of the particular debt, and not in discharge of a balance due (Tippetts v. Heane, 1 C. M. & R. 252). Nor will part payment of a debt take a case out of the statute, unless the payment is made under circumstances which warrant a jury in inferring a promise to pay the residue (Morgan v. Rowlands, L. R., 7 Q. B. 493; Wainman v. Kynman, 1 Ex. 118).*

In *Burn v. Boulton* (2 C. B. 476), it was held, that where a specific sum of money is due, as upon a note, the mere fact of a payment of a smaller sum by the debtor to the creditor is some evidence of a part payment to take the case out of the statute.

Payment of Interest. Sub-rule 3.—*Payment, or part payment (Dowling v. Ford, 11 M. & W. 329), of interest qua interest (Sims v. Brutton, 5 Ex. 802), will also be sufficient to prevent the operation of the statute, provided a promise to pay the principal can be inferred from such payment (Morgan v. Rowlands, L. R., 7 Q. B. 493). Any facts which would have supported a plea of payment, if an action had been brought for the interest, will constitute a payment of interest (per Martin, B., in Maber v. Maber, L. R., 2 Ex. 153).*

(1) In *Morgan v. Rowlands*, a payment of interest made under compulsion of law was held not to be sufficient for the reason stated above.

(2) In *Maber v. Maber*, a debt due to the plaintiff from his son had been barred by the statute. The plaintiff, his son, and his son's wife, had an interview, at which the interest due was calculated. The plain-

tiff's son then put his hand into his pocket, as if to get the money out to pay it, when the plaintiff stopped, and writing a receipt for the interest, gave it to his son's wife, saying that he would make her a present of the money. No money actually passed between the parties. Held, that this constituted a sufficient payment of interest to take the case out of the operation of the statute, and that it was not essential that money should actually pass between the parties.

Proof of Payment in Bills, Notes, or other Writing. Sub-rule 4.—*By sect. 3 (9 Geo. 4, c. 14), it is enacted, that no indorsement or memorandum of any payment upon any promissory note, or other writing, by or on behalf of the party to whom such payment shall be made, shall be deemed sufficient proof of such payment.*

Joint Contractors. RULE 90.—No joint contractor, or his executor or administrator, shall lose the benefit afforded by the Statute of Limitations, so as to be chargeable in respect, or by reason only of, any written acknowledgment or promise made and signed by any other joint contractor (9 Geo. 4, c. 14, s. 1). And by 19 & 20 Vict. c. 97, s. 14, there is a similar provision now made in respect to payment of any principal, interest, or other money by any other co-contractor, co-debtor, &c.

When the Promise of Acknowledgment must be Made. RULE 91.—The promise or acknowledgment (whether such acknowledgment be by writing, or part payment of principal, or payment or part payment of interest) must be made before action brought (*Bateman v. Pinder*, 3 Q. B. 574; *Thornton v. Illingworth*, 2 B. & C. 824).

CHAPTER IV.

ON THE DISCHARGE OF OBLIGATION.



SECTION I.

I. *Performance.*

THE most obvious way of discharging an obligation imposed by a simple contract is, of course, by the due performance of that which has been undertaken to be done.

Performance. RULE 92.—A person who has entered into a contract, and who has not been released from the performance thereof by the contractee, in the manner hereinafter specified, is bound to perform the same, unless legally excused from so doing. Nor is any demand, or request, necessary from the other contracting party, except in those cases in which it is expressly contracted to be so, or in which it is required by reason of the peculiar nature of the contract (see *Radford v. Smith*, 3 M. & W. 254).

(1) So a person who owes a sum of money is, in accordance with the rule that the debtor must seek out his creditor, liable to pay the same without being requested to do so by the person to whom it is payable (*Soward v. Palmer*, 8 Taunt. 277).

(2) For the same reason, an acceptor of a bill, or maker of a note, is generally bound to pay the same, although it has not been presented to him for payment (*Turner v. Hayden*, 4 B. & C. 1; *Norton v. Ellam*, 2 M. & W. 461).

(3) But where a bill or note is made payable at or after sight, or after demand, presentment or demand must be made before the acceptor or maker can be rendered liable thereon (*Dixon v. Nuttal*, 1 C. M. & R. 307; *Holmes v. Kerrison*, 2 Taunt. 325; *Thorpe v. Booth*, R. & M. 388).

(4) A request to pay, also, would seem to be proper before suing a surety for non-payment of a balance of account between the principal debtor and the creditor (see *Remarks by Mr. Chitty on page. 663*).

When Performance is Excused.—In the following cases performance of the contract by the contractor is excused :—

1. When, at the time of making the contract, the thing contracted to be done was in itself impossible (see *ante*, p. 93); or where the contract was of such a nature that the parties must have been taken to have contracted on the understanding, that their agreement was to be at an end, unless a given thing, or person, or the health, or ability of some person continued to exist, and that given thing or person, or health or ability, has not continued to exist (see *ante*, p. 94); or where the promise was to do something for which the *personal* skill or labour of the promissor was required, and, owing to the act of God, he is rendered incapable of doing the same

(*Boast v. Firth*, *L. R.*, 4 *C. P.* 1; *Robinson v. Davison*, *L. R.*, 6 *Ex.* 269).

(1) In *Robinson v. Davison*, the defendant's wife, who was a famous pianist, engaged to play at a certain concert, but when the time arrived for her to do so, was unable to fulfil such engagement by reason of illness. Held, that such illness was a good excuse for the non-performance of her contract.

It appears that, in such a case as this, the other party would also have a right to rescind the contract, if the person engaged were really unfit to perform his or her engagement properly (*Poussard v. Spiers & Pond*, *L. R.*, 1 *Q. B. D.* 410).

(2) "A contract by an author to write a book, or by a painter to paint a picture, within a reasonable time, would, in my judgment, be deemed subject to the condition that, if the author became insane, or the painter paralytic, and so incapable of performing the contract by the act of God, he would not be liable personally in damages, any more than his executors would be if he had been prevented by death" (*per* Pollock, *C. B.*, in *Hall v. Wright*, *E. B. & E.* 793).

2. Where the impossibility of performing the contract is caused by the act of the law, or by public authority ;

3. Or where the impossibility of performance is caused by the contractee (*European Mail Co. v. Royal Mail Steam Co.*, 30 *L. J.*, *C. P.* 247; *Roberts v. Bury Commissioners*, *L. R.*, 5 *C. P.* 310; *Jones v. St. John's College*, *L. R.*, 6 *Q. B.* 115; *Thornhill v. Neats*, 8 *C. B.*, *N. S.* 831; *Holme v. Guppy*, 3 *M. & W.* 387).

4. Where the other contracting party refuses or fails to perform, and there is no legal excuse for his not performing (see *Chitty*, 688), his part of the contract, provided such performance is a condition precedent to the defendant becoming liable (see *Morton v. Lamb*, 7 T. R. 125; *Coombes v. Green*, 11 M. & W. 480; and notes to *Cutter v. Poirell*, 2 Sm. L. Ca. 1). Where the act of the plaintiff is to be done at the same time as that of the defendant, the former, before he can sue, must show his readiness and willingness to perform his part of the contract, or some legal excuse for not doing so (*Giles v. Giles*, 9 Q. B. 164; *Bankart v. Bowers*, L. R., 1 C. P. 484; *Atkinson v. Smith*, 14 M. & W. 695).

5. Where the contract is illegal (*Cowan v. Milbourne*, L. R., 2 Ex. 230; *ante*, p. 230).

6. Where the defendant has been induced to enter into the contract by the plaintiff's fraud (see *ante*, 136); or where there has been a total failure of the consideration for his promise (*Kennedy v. Panama Mail Co.*, L. R., 2 Q. B. 580), and he has chosen to rescind the same.

When a Contract must be Performed.

RULE 93.—Whenever a party to a contract undertakes to do some particular act, the performance of which depends entirely on himself, so that he may choose his own mode of fulfilling his undertaking, and the contract is silent as to the time, the law implies a contract to do it within a reasonable

time under the circumstances. . . But where the act to be done is one in which both parties are to concur, and both bind themselves to the performance of it, that which is implied by law in such a case, is not that either party contracts that it shall be done within a fixed or a reasonable time; but that each contracts that he should use reasonable diligence in performing his part (*per* Blackburn, J., in *Ford v. Cotesworth*, *L. R.*, 4 *Q. B.* 133).

Where a Particular Day is Named. Sub-rule 1.—*Where, however, a particular day is appointed on which the contract is to be performed, it is, in most cases, necessary that performance should take place on that particular day* (*Dobie v. Larkan*, 10 *Ex.* 776).

In equity relief was frequently given, notwithstanding that a particular time had been named for performance, if the party who had failed to complete his contract within that time, could show that the breach thereof had been purely accidental, and occasioned by circumstances wholly beyond his control, and the relief, if granted, would occasion no injustice to the defendant (see *Tilley v. Thomas*, *L. R.*, 3 *Ch. App.* 61).

By the Judicature Act of 1873, sect. 25 (7), it is now provided, "that stipulations in contracts as to time or otherwise, which would not before the passing of this act have been deemed to be, or to have become, the essence of such contracts in a Court of Equity, shall receive in all courts the same construction and effect as they would have heretofore received in equity."

When Defendant may be Sued before the Day named for Performance. Sub-rule 2.—

A person, who is not bound to perform his contract until a particular time, may, nevertheless, be sued before that time, if he disables himself from performing it, or expressly refuses to perform it.

(1) "If," said Campbell, C. J., in *Hochster v. De la Tour* (2 E. & B. 678), "a man promises to marry a woman on a future day, and, before that day, marries another woman, he is instantly liable to an action (*Short v. Stone*, 8 Q. B. 358). If a man contracts to execute a lease on and from a certain day, for a certain term, and, before that day, executes a lease to another for the same term, he may be immediately sued for breaking the contract" (*Ford v. Tiley*, 6 B. & C. 325).

(2) So, in an action for breach of promise to marry at a certain time, if the defendant, though not married to some other woman, has nevertheless absolutely refused to marry the plaintiff, she may maintain her action directly such refusal has been given (*Frost v. Knight*, L. R., 7 Ex. 111; *Cherry v. Thompson*, L. R., 7 Q. B. 579).

(3) In an action for non-delivery of goods, the vendor may be sued before the day appointed for the delivery, if he has expressly told the vendee that he does intend to deliver them (*Roper v. Johnson*, L. R., 8 C. P. 167).

SECTION II.

*Mutual Agreement—Accord and Satisfaction—
Operation of Law.*

I have now to consider the mode by which the obligation imposed by a simple contract can be discharged, supposing there is neither performance nor any of the legal excuses for non-performance, the most important of which have been mentioned in the last section.

How it may be Discharged before Breach.

RULE 94.—The obligation imposed by a simple contract, whether written or verbal, may, before breach, be discharged by a mere verbal agreement (*Foster v. Dauber*, 6 *Ex.* 839, 851).

(1) In *King v. Gillet* (7 *M. & W.* 55), which was an action brought for a breach of promise to marry, it was held that a plea stating that, after the promise of the defendant, and before breach thereof, the plaintiff exonerated and discharged him from performing the same, was held good.

(2) This rule would seem to apply, as has been stated, to a contract that has been, and is bound to be, reduced into writing. So, it has been held, that a contract, coming under the Statute of Frauds, may be *waived*, although it cannot be varied, by a subsequent oral agreement (*Goss v. Lord Nugent*, 5 *B. & Ad.* 58; but see *Harvey v. Grabham*, 5 *Ad. & E.* 61).

How it may be Discharged after Breach.

RULE 95.—After breach, the obligation im-

posed by a simple contract cannot be discharged except by a release under seal, or by an accord and satisfaction (*Cook v. Lister*, 13 C. B., N. S. 587), or by operation of law (*Co. Litt.* 264 b).

What is an Accord and Satisfaction.—

An accord is an agreement made between the person who has committed the breach and the person injured thereby, that the former shall make satisfaction to the latter by doing something in lieu of the thing which he had contracted but failed to do; and satisfaction is the performance of such agreement (3 *Steph. Com.* 258; *Whar. Law Dic.*).

What amounts to an Accord and Satisfaction. Sub-rule 1.—*Where the damages are unliquidated, a smaller sum paid by the debtor to the creditor may be pleaded as an accord and satisfaction; but where the claim is a liquidated and ascertained sum, the payment of a part cannot be pleaded as a satisfaction of the whole, unless it is paid in a manner, place, or at a time different to that originally agreed upon. It is clear, however, that the debtor may give anything of an inferior value in satisfaction of the sum due, provided it be not part of the sum itself* (see judgment of Parke, B., in *Sibree v. Tripp*, 15 M. & W. 34).

(1) In the leading case on this point, *Cumber v. Wane* (1 Sm. L. Ca. 341), it was held that 5*l.* could not be pleaded in satisfaction of 15*l.*; though had a horse of that value been given it would have been

otherwise (see *Sibree v. Tripp*; *Pinnell's case*, 5 Rep. 117).

"There must be some consideration for the relinquishment of the residue, something collateral, to show the possibility of benefit to the party relinquishing his further claim, otherwise the agreement is *nudum pactum*" (*per* Lord Ellenborough in *Fitch v. Sutton*, 5 East, 230).

(2) In *Sibree v. Tripp* (*sup.*), a negotiable instrument, given in satisfaction of a debt of a greater amount than the sum for which the note was made payable, was considered to be a good accord and satisfaction.

For cases showing that a less sum would be a sufficient accord and satisfaction where the debt is unliquidated, see *Longridge v. Dorville* (5 B. & A. 117); *Wilkinson v. Byers* (1 A. & E. 106); *Llewellyn v. Llewellyn* (3 Dowl. & L. 318).

Accord must generally be Executed.

Sub-rule 2.—*The accord, in order that it may operate as a good discharge, must, generally speaking, be executed* (*Edwards v. Chapman*, 1 M. & W. 231; *Gabriel v. Dresser*, 15 C. B. 622). *But where it appears that the plaintiff accepted the promise itself in satisfaction, and not the performance thereof, that will be sufficient* (*Hall v. Flockton*, 16 Q. B. 1039; *Evans v. Powis*, 1 Ex. 601); *and whether he has done so or not is a question for the jury* (*ibid.*; see notes to *Cumber v. Wane*, *supra*).

Exception to Rule 95.—It appears that a sum due on a bill of exchange or a promissory note may be

forgiven by word of mouth; *a fortiori*, therefore, may a smaller sum be pleaded as a good accord and satisfaction to an action brought thereupon (see *Foster v. Dauber*, 6 *Ex.* 839, and the remarks in 1 *Sm. L. Ca.* 351; but also *McManus v. Back*, *L. R.*, 5 *Ex.* 65).

Operation of Law.—As an example of an obligation being released by operation of law may be stated the case of a *feme* creditor marrying her debtor (see *Milbourn v. Ewart*, 5 *T. R.* 381; *Fitzgerald v. Fitzgerald*, *L. R.*, 2 *P. C.* 83). For further illustrations, see those stated by Mr. Chitty on pp. 714, 715.

CHAPTER V.

ORAL EVIDENCE AND WRITTEN CONTRACTS,
DAMAGES, &c.

RULE 96.—When once a simple contract has been reduced into writing, oral evidence of what took place between the parties previous to, or contemporaneously with, such reduction, is inadmissible to add to, or subtract from, or in any manner to vary or qualify such written contract. Oral evidence may be used, however, for the purpose of showing, that there was a separate oral agreement between the parties that the written contract was not to take effect until the happening of a certain event, or until a certain condition had been performed; or that there was fraud, illegality, duress, failure or want of consideration, or mistake (see *Sm. on Con.* 41; *Stephen on Evid.* 91, 92).

(1) A. entered into a verbal contract with B. to sell him a farm, which he was then holding under C. Having failed to perform this agreement he was sued by B. for breach thereof. Held, that A. might call verbal evidence to prove that, at the time of entering into the contract, it was agreed between himself and B. that its performance should be conditional on C.'s consent to the transfer being procured, and that such

consent had not been obtained (*Pym v. Campbell*, 6 E. & B. 370; see also *Wallis v. Littel*, 11 C. B., N. S. 369).

(2) The plaintiff entered the service of the defendant, under a memorandum in writing, as follows:—
 “April 13th, 1871. I hereby agree to accept the situation of foreman of the works of Messrs. Roe & Co., and to do all that lies in my power to serve them faithfully, and to promote the welfare of the said firm, on my receiving a salary of £2 per week and a house to live in from the 19th of April, 1871.”
 Held, a weekly hiring from the 19th of April, 1871, and that evidence of a conversation, at the time of signing the contract, tending to show that a hiring for a year was intended, was not admissible (*Erans v. Roe*, L. R., 7 C. P. 138).

(3) To an action by a payee against the drawer of a bill of exchange payable twelve months after date, the defendant pleaded that he drew the bill and delivered it to the plaintiff for the accommodation of the acceptor and as surety for him; that at the time the defendant so delivered the bill to the plaintiff it was agreed between the plaintiff and the defendant and the acceptor, that the acceptor should deposit with the plaintiff certain securities to be held by him as security for the due payment of the bill, and that in case the bill should not be duly paid, the plaintiff should sell the securities, and apply the proceeds in liquidation of the bill, and that, until the plaintiff should have so sold the securities, the defendant should not be liable to be sued on the bill. The plea then went on to aver that the securities

were deposited with the plaintiff by the acceptor, but that the plaintiff had not sold but still held them. Held (Willes, J., doubting), that oral evidence of the agreement was not admissible, inasmuch as it contradicted the express written contract on the face of the bill (*Abrey v. Cruz*, *L. R.*, 5 *C. P.* 37; see *Young v. Austen*, *L. R.*, 4 *C. P.* 533).

(4) In an action by a payee against the maker of a promissory note, though, as we have seen, it is not competent to the latter to controvert by parol the contract that appears on the face of the note, he may nevertheless show that there was no consideration for his promise or that it has failed (*Abbot v. Hendricks*, 1 *M. & Gr.* 791).

See further *Angell v. Duke*, *L. R.*, 10 *Q. B.* 174; *Morgan v. Griffith*, *L. R.*, 6 *Ex.* 70; *Malpas v. L. & S. W. Rly. Co.*, *L. R.*, 1 *C. P.* 336; and notes to *Collins v. Blantern*, 1 *Sm. L. Ca.* 369.

Subsequent Verbal Agreement. RULE 97.—Where the written contract is one that is not bound to be in writing, oral evidence of what has passed between the parties subsequently to the making thereof, may be used for the purpose of varying or qualifying its terms.

(1) In *Eden v. Blake* (13 *M. & W.* 614), an auctioneer, who had described an article in his printed catalogue as being made of silver before it was sold (for the price of six pounds), publicly stated at the sale that it was only plated. Held, that this was a verbal sale, of a plated article, and that evidence that

the statement in the catalogue had been varied by the subsequent announcement mentioned, was admissible.

(2) Where, however, the agreement was for the sale of certain lots of land (and consequently a contract coming under the 4th section of the Statute of Frauds), the vendor undertaking to make a good title thereto, it was held that oral evidence could not be admitted for the purpose of showing that the vendee had subsequently agreed to take one lot without a good title (*Goss v. Lord Nugent*, 5 B. & Ad. 58; *Noble v. Ward*, L. R., 1 Ex. 117; 2 Ex. 135).

As to written contracts being subsequently *totally rescinded* by parol, see Chapter IV.

Custom and Usage. RULE 98.—Oral evidence of custom and usage “is admissible to annex incidents to written contracts in matters with respect to which they are silent,” provided that, when so annexed, such incidents are not inconsistent with the written contract; for when that is the case “the contract must prevail, and the custom of the country must be excluded” (*Wigglesworth v. Dallison*, 1 Sm. L. C. 598; *per Parke, B.*, in *Hutton v. Warren*, 1 M. & W. 474; *per Alderson, B.*, in *Clarke v. Royston*, 13 M. & W. 752).

Oral annexation of custom to written contracts has been allowed (to quote the words of Parke, B., in his exhaustive judgment in *Hutton v. Warren*, *sup.*), “upon the principle of presumption that, in such

transactions, the parties did not mean to express, in writing, the whole of the contract by which they intended to be bound, but to contract with reference to those known usages."

(1) So, in *R. v. Stoke-upon-Trent* (5 Q. B. 303), it was held, that an agreement for the hire of servants at certain wages for a couple of years, such servants to lose no time on their own account, and to behave themselves properly, and to do their work well, might be qualified by oral evidence of a custom, in that particular trade in which they were engaged, giving them a right to have certain holidays.

(2) In *Brown v. Byrne* (3 E. & B. 703), the defendant, who was sued by a shipowner, on an agreement to pay freight at a certain rate per pound, was allowed to bring evidence of a custom of the trade at a given port, to allow three months' discount on freights or goods forwarded from certain ports.

(3) A contract of hiring in writing by which a yearly salary was provided for, and a bonus at the end of the year, supposing the master's approval was obtained, may be qualified by oral evidence of a custom in the trade that the master might dismiss his servant at a month's notice (*Parker v. Ibbetson*, 4 C. B., N. S. 346; see *Fleet v. Murton*, L. R., 7 Q. B. 126; *Cropper v. Cook*, L. R., 3 C. P. 194; *Hutchinson v. Tatham*, L. R., 8 C. P. 482; *Grissell v. Bristowe*, L. R., 4 C. P. 36).

(4) But where a policy of insurance stated that it was "on the ship till moored at anchor twenty-four hours, and on the goods till discharged and safely landed," evidence was held inadmissible to show a

custom that the risk on the goods expired in twenty-four hours; the effect of admitting such a custom being to contradict the words of the policy (*Parkinson v. Collier, Park, Ins.* 6th ed. 416; see *Dickenson v. Jardine, L. R.*, 3 C. P. 639; *Hall v. Janson*, 4 E. & B. 500; *Clarke v. Royston, sup.*; *Crouch v. Credit Foncier of Eng., L. R.*, 8 Q. B. 374).

Oral Evidence to explain Written Contracts. RULE 99.—“Oral evidence may be given to explain the meaning of foreign, obsolete, technical, local, or provincial expressions, of abbreviations and of common words which from the context appear to have been used in a peculiar sense; but evidence may not be given to show that common words, the meaning of which is plain, and which do not appear to have been used in a peculiar sense, were in fact so used” (*Stephens on Evidence*, p. 95).

(1) Thus, in *Spicer v. Cooper* (1 Q. B. 424), oral evidence was held admissible to prove that the expression “sold 18 pockets Kent hops at 100s.” meant, in the hop trade, 100s. per cwt. So, in *Gorriessen v. Perrin* (2 C. B., N. S. 681), that the word “bale” in the Gambia trade signified a compressed package weighing about 2 cwt. (see further, *Cuthbert v. Cumming*, 10 Ex. 809, 11 Ex. 405; *Robertson v. Jackson*, 2 C. B. 412; *Warde v. Stewart*, 1 C. B., N. S. 88; *Smith v. Wilson*, 3 B. & Ad. 728).

(2) But where in an action on a warranty of

“prime singed bacon,” evidence was offered to prove that that expression meant, in the bacon trade, bacon to some degree tainted, it was rejected (*Yates v. Pym*, 6 *Taunt.* 446).

(3) For a like reason evidence of the words “cargo” and “freight,” signifying passengers as well as goods, was held inadmissible (*Lewis v. Marshall*, 7 *M. & G.* 729; see *Blackett v. Royal Ex. Ass. Co.*, 2 *C. & J.* 244; *Smith v. Battams*, *L. J.*, 26 *Ex.* 232; *Smith v. Jeffrys*, 15 *M. & W.* 561).

Patent Ambiguity. RULE 100.—Although a latent ambiguity may be explained by oral evidence, yet, where the ambiguity is patent, or in other words, where the doubt arises, not, as in the case of a latent ambiguity, from surrounding circumstances, but from some defect apparent on the face of the instrument itself, parol evidence is not admissible to explain it.

Thus, in *Saunderson v. Piper* (5 *N. C.* 425), a bill of exchange, which was expressed in words to be for 200*l.*, was, in the margin, stated in figures to be for 245*l.* Held, that oral evidence to explain the mistake was not admissible.

Damages Generally.

RULE 101.—Where two parties have made, a contract which one of them has broken, the

damages which the other party ought to receive in respect of such breach of contract should be such as may fairly and reasonably be considered either arising naturally, *i. e.* according to the usual course of things, from such breach of contract itself, or such as may reasonably be supposed to have been in the contemplation of both parties at the time they made the contract as the probable result of the breach of it" (*Hadley v. Baxendale*, 9 *Ex.* 341, 354).

"Now, if the special circumstances," it was further said in that case, "under which the contract was actually made were communicated by the plaintiffs to the defendant, and thus known to both parties, the damages resulting from the breach of such a contract - which they would reasonably contemplate would be, the amount of injury which would ordinarily follow from a breach of contract under these special circumstances so known and communicated. But on the other hand, if these special circumstances were wholly unknown to the party breaking the contract, he at the most could only be supposed to have had in his contemplation the amount of injury which would arise generally, and in the great multitude of cases, not affected by any special circumstances from such a breach of contract. For had the special circumstances been known, the parties might have specially provided for the breach of contract by special terms as to the damages in that case, and of this advantage it

would be very unjust to deprive them. The above principles are those by which we think the jury ought to be guided in estimating the damages arising out of any breach of contract."

The following cases exemplify this rule:—*Great Western R. Co. v. Redmayne*, *L. R.*, 1 *C. P.* 329; *Engel v. Fitch*, *L. R.*, 2 *Q. B.* 314; *Spedding v. Nevell*, *L. R.*, 4 *C. P.* 212; *Horne v. Midland R. Co.*, *L. R.*, 7 *C. P.* 583; *Bradshaw v. Lanc. & York. R. Co.*, *L. R.*, 10 *C. P.* 189; *Bazendale v. London, Chatham and Dover R. Co.*, *L. R.*, 10 *Ex.* 35; *Cory v. Thames Iron Work Co.*, *L. R.*, 3 *Q. B.* 181; *Smith v. Green*, *L. R.*, 1 *C. P. D.* 92.

Contracts entered into Abroad. RULE 102.—A contract that is made abroad, and sued on in this country, is usually expounded according to the law of the place where it was made (*lex loci contractûs*); but it is enforced, both in respect to the time within which the action must be brought, and the mode and manner of proceeding, according to the law of this country (*lex loci fori*); see notes to *Mostyn v. Fabrigas*, 2 *Sm. L. Ca.* 658).

(1) In *Trimbey v. Vignier* (1 *Bing. N. C.* 151) a holder of a bill drawn in France, and in the same country endorsed in blank, was held not to be able to recover upon it, in an action against the acceptor, who resided in England; because it was

thought that by the French law a mere blank endorsement was not sufficient to pass the property secured by the bill.

(In *Bradlaugh v. De Rin*, *L. R.*, 5 *C. P.* 473, the Exchequer Chamber refused to follow this case, on the ground that the court had mistaken the French law on the subject. Inasmuch, however, as the *principle* on which it was decided remains unimpeached, I have inserted it here for the sake of the excellent illustration it affords of the above rule.)

(2) A contract coming under the 4th section of the Statute of Frauds, entered into verbally abroad, and which, according to the law of the country wherein it was made, was binding upon the parties, cannot be enforced here (*Leroux v. Brown*, 12 *C. B.* 801; see, however, *Gibson v. Holland*, *L. R.*, 1 *C. P.* 8; *Lloyd v. Gilbert*, *L. R.*, 1 *Q. B.* 115).

(3) In *The British Linen Co. v. Drummond* (10 *B. & C.* 903), an action on a contract made in Scotland, and which might, in that country, have been enforced within forty years, was held to be barred by the English Statute of Limitations.

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LONDON:
7, FLEET STREET, E.C.
1879.

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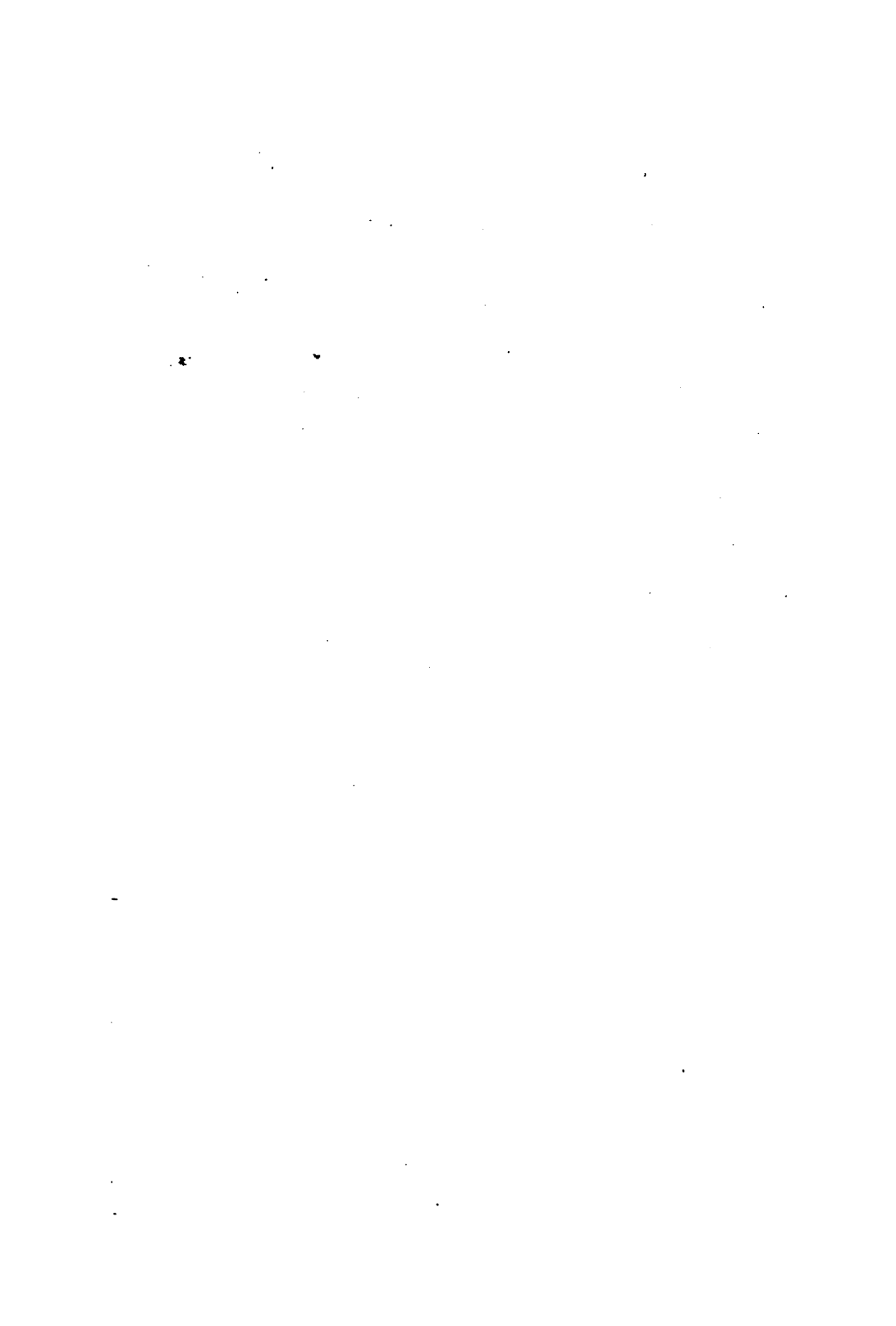
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